

United States
Circuit Court of Appeals

For the Ninth Circuit.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Appellant,

vs.

EBNER GOLD MINING COMPANY, a Corporation, THE ALASKA-EBNER GOLD MINES COMPANY, a Corporation, ANGUS MACKEY, as Receiver for THE ALASKA-EBNER GOLD MINES COMPANY, a Corporation, and DOWNIE D. MUIR,

Appellees.

Transcript of Record.

VOLUME IV.

(Pages 1217 to 1632, Inclusive.)

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

JUL 1 - 1916

F. D. Monckton,
Clerk

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(Testimony of D. D. Muir, Jr.)

Q. You expect to sink below that tunnel level in connection with this development work? [1099—949]

A. We are liable to sink below the tunnel level.

Q. And you think you might use as much as an additional 100 horse-power for that purpose?

A. Yes; and maybe more.

Q. Now, what else could you use it for, Mr. Muir, in connection with this development or yours?

A. Well, I have got to reiterate myself, Mr. Helenthal, in answering your question; I have to go over the same questions.

Q. Now, you have explained to me everything that you could possibly use power for in your development, haven't you?

A. My answer to your question is just the same as I stated to the Judge; I do not know and cannot foresee the future of the development, but I make the estimate now that we will require 30 second-feet of water, or 1,200 miner's inches of water and you come back and tell me we need only so much water—

Q. I am asking you now if those are the only apparatus or machines that you can now foresee that you can use in connection with your development work?

A. As far as I can foresee, yes, sir.

Q. Now, Mr. Muir, how much head have you got?

A. 427 feet.

Q. How many horse-power will a miner's inch develop with a head of 427 feet, vertical horse-power?

A. Oh, it will be very close to a horse-power to a miner's inch.

(Testimony of D. D. Muir, Jr.)

Q. It will be a good deal more than that, won't it?

A. A miner's inch is a foot and a half of water a minute, and anything else is absurd.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [1100—950]

The defendant, to further maintain the issues on its part, introduced as a witness J. R. WINN, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of J. R. Winn, for Defendant.

Direct Examination.

(By Mr. BURTON.)

Q. How long have you resided in Juneau?

A. Since 1897.

Q. How long have you been familiar with what is known as the Ebner Gold Mining Company's properties.

A. Why, I had some law business for Mr. Ebner before he ceased operations up there, and became somewhat familiar with the properties before the disposition by Mr. Ebner of his stock to Mr. Underwood as he has testified concerning.

Q. Are you attorney for him—have you been connected with the Company as attorney for some years, the Ebner Gold Mining Company or the Ebner Company?

A. Well, I was connected principally with the old Ebner Company; then when some work was going on here under Mr. Mackay—I suppose he was backed

(Testimony of J. R. Winn.)

by either the Alaska-Ebner Gold Mining Company or the California-Nevada Copper Company, and, of course, we have had business in a way for all those companies pertaining to this Ebner property.

Q. Well, you have been attorney for the Ebner Gold Mining Company for several years, have you not, Judge Winn? A. Yes, sir.

Q. Prior to 1910? A. Yes, sir.

Q. I hand you a picture and ask you if there is anything on [1101—951] there that you particularly recognize?

A. This is Defendant's Exhibit "F-1"; it is the photograph that was identified by Mr. Wettrick this morning, and I identify the post or board near the intake of the new Ebner flume and also the cross-board that is on it as being the place at which I posted up a certain location notice that I made for the Ebner Gold Mining Company, which has been offered in evidence in this case; I also may state in that connection that Al Black came over at the time I put up this notice, and Mr. Black had been at work up there for some days, and had the approach for the right of way of the flume cleared away for quite a little distance from the intake of the flume at the Ebner dam; Black came over and he was there at the time the notice was posted, and I walked over and saw what work he had been doing.

Q. Was anyone else present at the time you posted that notice besides Black?

A. Yes; Mr. Hill went up there with me and Mr. Wettrick.

(Testimony of J. R. Winn.)

Q. In examining this picture did you notice there anything marked as being the place you posted your notice?

A. Yes; it is indicated by that upright board or post at the new intake; the new intake is quite visible there; it is near the center of this picture and it shows plainly on the picture.

Q. I will ask you, Judge Winn, if in connection with the property of the Ebner Gold Mining Company you had charge of lawsuits brought against that company, or the bringing of lawsuits either for or against the company, since 1910?

A. Yes; there are quite a number of suits here pending.

Q. Do you know what those suits are?

A. I will also state that I was on this property at the time Mr. [1102—952] Bent and his party came here.

Q. What year was that?

A. In July or August, 1910; and since they came here there has been a series of lawsuits commenced by the Alaska-Juneau Gold Mining Company, the plaintiff in this case, against either the Ebner Gold Mining Company or the California-Nevada Copper Company; one case is the Alaska-Juneau Gold Mining Company vs. The California-Nevada Copper Company, No. 823-A of this court.

Q. Do you know that suit is about?

A. I don't unless I read the complaint. (Complaint handed to witness.) This is a suit that was commenced by the plaintiff company in this suit and

(Testimony of J. R. Winn.)

asked for a restraining order to restrain the California-Nevada Copper Company and the Ebner Gold Mining Company, Angus Mackay, Al Graham and F. J. Wettrick from destroying certain flume lines that they contend they were building there on what they call the Oregon lode claim, and what we contended at that time as being the Parish No. 2 lode claim.

Q. Was this what they call the old Oregon lode claim or the Datson Oregon?

A. The records will show there, I don't know.

Q. When was that suit brought?

A. It will show—I will see when the summons was issued.

Q. The complaint was filed November 3d, 1910.

A. That is the case I referred to and grew out of a conflict of them claiming the Oregon claim and our claiming it was the Parish No. 2 claim, both of which claims I think are referred to and included in Judge Cushman's judgment which is filed in connection with the plaintiff's reply in this case—both Oregon [1103—953] claims are mentioned in his decree, and this one of those Oregon claims that I am stating concerning and the Parish No. 2 that I referred is the Parish No. 2 referred to in that decree of Judge Cushman; now, there is another one, the Alaska-Juneau Gold Mining Company vs. The Ebner Gold Mining Company, No. 826-A.

Q. I hand you the papers in that case which show that the complaint was filed November 17, 1910—what was that suit brought for?

(Testimony of J. R. Winn.)

A. This is a suit brought by the plaintiff company in the suit we are trying now against Angus Mackay, B. M. Behrends, and all others similarly situated or acting or claiming to act as associated in a certain corporation known as the Ebner Gold Mining Company, a corporation, and is a suit claiming what they term here the Oregon lode claim—whether that is the Datson Oregon lode claim or the old Oregon lode claim I do not know.

Q. Do they give the location of that Oregon in the complaint?

A. It does not give the date of the location of the claim; anyway, it is one of the Oregon lode claims that is mentioned in the decree of Judge Cushman, which is set forth in the reply in this case; that decree refers to the Corbus Oregon lode claim and also to the Datson Oregon lode claim; they seek here relief against the plaintiff to quiet title.

Q. Do you remember cause No. 804-A of this court brought by H. T. Tripp against the Alaska-Juneau Gold Mining Company—I will hand you the papers.

A. I think that suit was brought over some conflict in a general way, because I think the suit has been dismissed; but it was brought over some conflict that was claimed between the Alaska-Juneau Company and Mr. Tripp, who was then acting in the capacity of representative of the Ebner Company; Tripp had [1104—954] either made some location of property or taken some property over in his name, but I think that suit was dismissed without

(Testimony of J. R. Winn.)

prejudice, and it grew out of the building of this cabin, I think, across the creek, known as the Harri cabin.

Q. Now, Judge Winn, you have testified to two or three lawsuits having been brought—I will ask you about that time how many lawsuits were brought involving the property rights of the Ebner Gold Mining Company?

A. Out of transactions that took place during the year of 1910, or I might say out of transactions that took place principally after Bent and his party visited Juneau in July and August of 1910, there has been commenced about nine or ten suits; a large majority of them have been commenced by the Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company, or someone connected with that company; for instance, the California-Nevada Copper Company or the Alaska-Ebner Gold Mining Company, and against Mackay and the people who were doing work up there, looking towards the carrying out of this plan of development; and there was, during that time, some three suits, I think, commenced by the Ebner Gold Mining Company against that same company over disputed property included in what had theretofore been claimed as the Ebner Gold Mining Company's property.

Q. You say about nine or ten suits in all were brought from 1910 on?

A. Yes, I think all those suits were commenced after August, 1910.

Q. Cause No. 803-A, the Ebner Gold Mining Com-

(Testimony of J. R. Winn.)

pany against the Alaska-Juneau Gold Mining Company, the complaint of which has been offered in evidence in this case, do you remember that suit, Judge Winn? [1105—955]

A. I looked over the complaint Mr. Hellenthal offered the other day; I didn't read it closely; as I remember that is probably one of the first suits that we brought; we ascertained at that time that the Alaska-Juneau Gold Mining Company had made a location—that is, the Datson Oregon claim, which is one of the Oregon claims that Mr. Wettrick testified to this morning, covering part or a portion of the Lotta patented claim, and we ascertained at that time that they had been going in and over the property, and that was to restrain them and keep them off of the property; I have forgotten what claims are mentioned in that suit, but that is the general nature of the suit—we claimed they were trespassing upon the property of the Ebner Gold Mining Company.

Q. At that time they had built the cabin, had they not—the cabin of Harri?

A. I don't remember; Mr. Harri's testimony will show as to that; anyway we found out that they were in and about the property at various points, commencing down here by the cabin on the Lotta claim.

Q. Do you know, what, if any, effect these lawsuits had with reference to the continuing of the development work upon the property? A. I do, sir.

Q. Will you state just how you know it and how you arrived at your information?

(Testimony of J. R. Winn.)

A. After Ebner and his party left here in 1910, and along in the latter part of August of that year and on up through the fall we had ascertained about these various locations that the Alaska-Juneau had been making; they had also during that time, I think in September of that year or in October, located what was referred to by Mr. Wettrick in his testimony [1106—956] as the Canyon lode claim, that covered a large part of the Lotta patented claim; they had also the Colorado claim located, and we ascertained sometime—let me see, that was in August, 1910—well, we found out what was going on, and were communicating with these parties back east all the time concerning it and finally they called me back east— (Objection to testimony.)

The COURT.—I will allow you to go this far: That the fact the suits had been brought here and the property was in litigation had a deleterious effect on your raising money in New York and you could not proceed as you otherwise would have done.

Q. Following out the Judge's suggestion, you may testify, if you know, just what effect, if any, these lawsuits that you have testified to had with reference to raising money to do the work on the property of the Ebner Gold Mining Company?

A. It prevented raising money for the prosecution of this work, and caused the delay that Mr. Mackay testified to during which there was nothing but assessment work done.

Q. I will ask you if you were back in New York in connection with this property?

(Testimony of J. R. Winn.)

A. I was, dealing with the people back there who were interested in it and who were raising the money.

Q. I will ask you, Judge Winn, how long it had that effect—can you state in any way how you obtained the information that it had the effect of preventing the raising of money?

A. As I say, it was by reason of the conditions of the property that I went back to New York.

Q. And while in New York you did ascertain that these lawsuits were preventing the raising of money to carry on the work? A. I did. [1107—957]

Q. Do you know from memory when the receivers were appointed in New York for the Ebner Company here?

A. I don't know the exact date; it was in April, 1912, I think.

Q. Do you remember when Mr. Mackay was appointed ancillary receiver?

A. He was appointed sometime, I think the 24th or 25th of June, 1912, by this court—not by Judge Jennings, but by Judge Lyons.

Mr. BURTON.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Are you sure the fact that these suits were pending had anything to do with the defunct condition of the California-Nevada Copper Company?

(Objection to question.)

Q. The California-Nevada Copper Company were raising this money, were they not, Judge?

A. It was supposed that the California-Nevada

(Testimony of J. R. Winn.)

Copper Company or Mr. Underwood, who was connected with that company, was raising the money part of the time, and then when Mr. Tripp came here, the California-Nevada Copper Company was afterwards changed to the Alaska-Ebner Gold Mines Company.

Q. The same concern?

A. Those two, I understand, are the same, only difference being in the name.

Q. They were raising the money, weren't they?

A. I couldn't say those companies were raising the money when I went back there.

Q. You don't know who was raising the money?

A. Yes; I do.

Q. Who was raising the money? [1108—958]

A. In the first place there were two committees organized, one of which was known as the Chapman committee, representing the bondholders, and another committee named the Cumnock; the two committees together represented all the bondholders, and the bonds that were issued under a certain mortgage is of record here.

Q. By the California-Nevada Copper Company?

A. No.

Q. Who issued those bonds—weren't those bonds of the California-Nevada Copper Company?

A. I don't know; that mortgage is here on record; it is either the California-Nevada Copper Company or the Alaska-Ebner Gold Mines Company; I have forgotten which one is mentioned in that mortgage.

Q. It is the same concern.

(Testimony of J. R. Winn.)

A. They took a mortgage.

Q. They gave a mortgage to the Trust Company.

Q. Did that concern give a mortgage of the stock of the Ebner Gold Mining Company and the property they had succeeded to from Mr. Ebner and also the property of the California-Nevada Copper Company?

A. I think the mortgage is on record and will show, but at the time that mortgage was given I don't know that that company had one cent of stock of the Ebner Gold Mining Company; there is an after-acquired clause in that mortgage which would cover any of the Ebner Gold Mining Company's stock that might come into the hands of the mortgagor.

Q. What was the date of the mortgage?

A. Oh, I don't remember.

Q. It was long before 1910? [1109—959]

A. Yes; before 1910.

Q. That mortgage was given by the California-Nevada Company before 1910, and bonds were issued secured by that mortgage? A. I think that is true.

Q. That mortgage contains a clause by which after acquired property became subject to mortgage?

A. I think so.

Q. And the stock of the Ebner Gold Mining Company and the California-Nevada Copper Company, under that clause, became part of the property covered by that mortgage?

A. Up to sometime, say a year or so ago the mortgagor did not have any more than somewhere be-

(Testimony of J. R. Winn.)

tween 20 and 30 per cent of the stock of the Ebner Gold Mining Company so as to bring it under the terms and conditions of that mortgage, and I am very sure, although I would not be positive, that even they acquired that after the mortgage was given.

Q. So there was only a small per cent of the property of the Ebner Gold Mining Company was affected by that mortgage?

A. None of the Ebner property was covered in that mortgage at all.

Q. And the people that were raising the money were the people representing the bond holders secured by that mortgage in New York City while you were there?

A. These two committees that I told you—the two committees, I think, together on my first trip represented about all of the bondholders under that mortgage; eventually the work was carried on by one committee, the Cumnock committee it seems retired from the field and the Chapman succeeded in getting all the bonds together except perhaps one person, and that was B. M. Behrends here in town, and they [1110—960] succeeded in bringing all of the stock of the Ebner Gold Mining Company under the terms of that mortgage, and that is the foreclosure that was made sometime ago in New York.

Q. That stock was brought in under the terms of that mortgage, the entire stock?

A. I don't think it was brought in there until a few months ago.

(Testimony of J. R. Winn.)

Q. Up to that time there was only about 30 per cent of the stock under that mortgage?

A. They kept collecting it in as fast as they could.

Q. That same committee went about trying to gather up the stock and get it in under the terms of that mortgage?

A. I think so.

Q. They didn't succeed until less than a year ago?

A. No; it was more than a year ago.

Q. As soon as they got it under the terms of the mortgage they sold the property, did they not?

A. They sold the stock.

Q. None of the property of the Ebner Gold Mining Company was affected by this mortgage—you have so testified?

A. None of it was affected by the mortgage, only the stock.

Q. But the property itself was not otherwise encumbered?

A. The mortgage does not set forth any description of mining claims.

Q. That mortgage also covered a large amount of property of the California-Nevada Copper Company, didn't it?

A. That I didn't go into and know nothing definite about it; I don't know anything about that property only from casually reading it over—I think it does.

Q. You had nothing to do with that property?

A. Not a thing in the world.

Q. This committee that was trying to reorganize

(Testimony of J. R. Wimm.)

the California-Nevada Copper Company, that went broke under Mr. Bent's direction— [1111—961] is that true?

A. I don't know what went broke under Mr. Bent's direction; I can tell you why this money could not be raised if that is what you want to know.

Q. Mr. George Bent was the managing spirit of this enterprise, was he not?

A. That enterprise has never had a managing spirit since I have had anything to do with it.

Q. He was the managing spirit prior to that time, wasn't he?

A. Probably in name; he had the name of manager.

Q. He had enough to do with it to wreck it, didn't he?

A. I don't think George Bent wrecked the Ebner property.

Q. I want to find out what the Ebner Company was doing in the way of raising money?

A. I will tell you if you—

Q. I am asking you if Mr. George Bent didn't have enough to do with this enterprise to wreck it?

A. I cannot say that he did, because Mr. George Bent had nothing to do with the Ebner Company; there was a very small part of the Ebner Gold Mining Company's stock affected by the mortgage—probably not to exceed 20 or 30 per cent; anyway, I am not sure whether that was yet mortgaged before Bent became connected with the Ebner Gold Mining Company.

Q. So you are not sure that the Ebner Gold Min-

(Testimony of J. R. Winn.)

ing Company had anything to do with the raising of funds by this deal or not?

A. The Ebner Gold Mining Company had nothing to do with it.

Q. The property of that company had nothing to do with it?

A. I know after it went into the hands of a committee, not while it was under Bent, but after we closed down the work, and after I made my trip back here, I know the committees had the whole thing in hand, and I know the reason they were not getting any money was because of these lawsuits. [1112—962]

Q. They told you that?

A. Yes; Barauch Brothers, and then as soon as they found out this litigation was on they dropped it.

Q. Don't you think that the fact that Mr. George Bent had never been connected with that property would have the same effect upon your raising much money?

A. I never heard Bent's name mentioned—the first trip I made back there I never had any dealings with him, and never heard his name connected with the raising of money.

Q. You know of your own knowledge that Mr. Bent was never connected with an enterprise that was not wrecked don't you?

(Not answered because of objection.)

Q. Wasn't it general knowledge in New York City and elsewhere among men who are engaged—among mining men who are furnishing money to mining enterprises that Mr. George Bent's connection with

(Testimony of J. R. Winn.)

the property would mean certain ruination?

A. No; I don't know anything of the kind; as I told you Mr. Bent, after my first trip to New York, which was in the spring of 1911, I never did see Mr. Bent or have anything to do with him, and in fact I never heard Mr. Bent discussed one way or the other.

Q. He had at that time dropped out of it, hadn't he?

A. I think he was running and operating one of the pieces of property in California or Nevada when I was there last, which belonged to the California-Nevada Copper Company, or the Alaska-Ebner Gold Mines Company as it was afterwards named.

Q. And all the promoters told you that the reason you could not raise money was because you were in litigation?

A. I don't know that they were promoters, it depends on what you would term a promoter.

Q. These gentlemen were consulted by you, were they not, which [1113—963] you have just recently mentioned?

A. We had a consultation, Thompson Towle and Barauch Brothers.

Q. And you finally succeeded in getting the money for getting the bonds together and selling the property?

A. I had nothing to do with that sale; of course that was made back east.

Q. That happened though?

A. The stock was sold, but the money that has been furnished here has been furnished in the manner in

(Testimony of J. R. Winn.)

which I think Mr. Mackay and Mr. Muir have testified; some of it has been furnished for Mr. George Noble in various ways which has come principally, I think, through the smelting company.

Q. When did the California-Nevada Copper Company go into the hands of a receiver, Judge?

A. Now, I don't know whether the California-Nevada Copper Company ever went into the hands of a receiver; the Alaska-Ebner Gold Mines Company have gone into the hands of a receiver here.

Q. When was that receiver appointed in New York for this concern?

A. For the Alaska-Ebner Gold Mines Company?

Q. Or the California-Nevada Copper Company?

A. One succeeded to the other; those receivers were appointed in New York sometime in April, I think, 1912.

Q. They had been appointed when you were back there? A. Not the first trip I made.

Q. Not the first trip? A. No.

Q. The second trip you made the receivers had been appointed?

A. Now, let me see if that is true—I made a trip in March, 1911, and the next trip, I think, I made there was in October—September or October, 1912, and these receivers were appointed—that is, the receivers had been appointed when [1114—964] I made that second trip—that is right.

Q. When was Mackay appointed receiver here?

A. I gave the date awhile ago, some time in April, I think, in 1912 that he was appointed temporary

(Testimony of J. R. Wimm.)

receiver; and another proceeding was pending in this court that was on account of the New York receivers having been appointed, and then it took us until about June 1st again to get the ancillary receiver appointed.

Q. Mackay was appointed ancillary receiver by an order of this court in April, 1912?

A. No, I think it was June, 1912.

Q. You started to have him appointed in April?

A. Yes, I think I started to have him appointed about that time—I think the New York receivers had been appointed before I got Mr. Mackay appointed temporary receiver, and I think that is why I did it, so as to have someone put in charge here until we could have someone appointed ancillary receiver to those appointed in New York.

Q. That was to wind up the affairs of the Alaska-Ebner Gold Mines Company, wasn't it?

A. I don't know—that receivership business and the appointment here, I don't know whether it properly wound it up or not; the complaint is here somewhere on file; I don't know what they prayed for in the complaint, whether it was up to wind up the organization or not.

Q. Now, the California-Nevada Copper Company furnished all the money that went into the construction work of this flume in the year of 1910 or '11, did it not? A. The year of 1910?

Q. Yes.

A. Well, Mr. Mackay was acting under Mr. Bent as kind of assistant [1115—965] manager here;

(Testimony of J. R. Winn.)

I think they must have raised that money before the bonds were sold.

Q. I am asking you if the California-Nevada Copper Company didn't furnish all the money that went into the flume construction in the year 1910-'11—you know don't you?

A. Why, I didn't handle the money, and I don't know; Mr. Mackay got the money before it went into the hands of a receiver; I wasn't paying any particular attention to the financial end of it; I think Mr. Mackay was conducting the business for a while in the name of the California-Nevada Copper Company, and that he was working under their directions.

Q. You know they were doing that work, don't you?

A. I was not back east and I don't know; I had nothing to do with it or the parties that were furnishing that money, whether they sent the money to Mr. Mackay or not, he would be a better judge of that; I don't know.

Q. They were doing the business, however, when that construction work was done in their name—you know that?

A. It was done under Mr. Mackay, whoever he was working for.

Q. You know he was working for the California-Nevada Copper Company, don't you?

A. I think probably he could tell you more about that than I can; I do know they got into financial straits.

Q. When did they get into financial straits?

(Testimony of J. R. Winn.)

A. This work went on from sometime about the 1st of August when we commenced, until when Mr. Mackay has testified that he closed down, or, I think, completed that flume; there wasn't any details I know of during the summer of 1910 and the fall, and then they commenced the tunnel I think in December, 1910 and the money began to slough off.

Q. He worked all the year of 1911, didn't he, on the tunnel?

A. No; I don't think so; I think he closed down the latter part [1116—966] of October or the 1st of November.

Q. He was working during the working season, wasn't he?

A. Yes; he was working with a limited number of men, and some private parties had to go to the rescue to put up some money to keep that work going on, and I think Mr. Hoops put up some.

Q. The company didn't have sufficient means and Mr. Hoops put up some money to carry the work on—is that right?

A. Yes; they could not raise the money on account of litigation.

Q. Now, Judge, I wish you would answer my questions, please—I wish you would answer that question directly—isn't it a fact that the company didn't have sufficient funds and Mr. Hoops, or whatever his name is, put up some of his own private money to carry on the work in 1911?

A. I think Mr. Hoops did put up some money.

(Testimony of J. R. Winn.)

Q. The company had run out of money, hadn't they?

A. They got so they couldn't raise any more money.

Q. And then Mr. Hoops put up some of his own money? A. Yes.

Q. And it was shortly after that that a suit was brought to foreclose this mortgage which was given to secure the outstanding bonds, and a receiver was appointed in that suit?

A. No; I don't think that mortgage foreclosure was commenced for a long time, Mr. Hellenthal.

Q. It was in the spring of 1912, wasn't it?

A. No; I am very sure that foreclosure suit was commenced in 1913; if I am right, I was back there in 1913, and I think that foreclosure suit was commenced in 1913—I wouldn't be sure of it.

Q. There was a suit brought at that time to have a receiver appointed before the foreclosure suit was brought?

A. Yes; when the suit was brought to foreclose the mortgage [1117—967] there were two receivers in foreclosure appointed.

Q. The other receivers were appointed at the instigation of outside creditors upon the application of the receiver or the corporation?

A. He was appointed on the petition of Hammer, who, I think, was a creditor stockholder, but just what his allegations in that complaint are, I couldn't tell you; they have a little different way of appointing receivers in New York than we have here; and I don't know what that complaint does contain; it is

(Testimony of J. R. Winn.)

here on file somewhere.

Q. You have your complaint here asking that Mr. Mackay be appointed ancillary receiver?

A. Oh, probably—probably followed the practice here; you have to make some application of that kind to get a receiver appointed.

Q. You put the other complaint in as an exhibit in that case, didn't you?

A. I think that other complaint is made a part of that other complaint; I think that complaint was drawn in New York—I don't remember.

Q. Now the method of raising money that these gentlemen was resorting to was by the sale of bonds of the California-Nevada Copper Company, wasn't it?

A. Yes; that was the method they first pursued.

Q. That was the method they pursued until the reorganization took place, wasn't it?

A. The reorganization hasn't been perfected yet.

Q. What other methods were pursued other than that of selling the bonds of the California-Nevada Copper Company?

A. Through the Chapman committee on reorganization.

Q. How did they raise money—what did they have to offer as [1118—968] security for money except bonds?

A. That I don't know; I don't know what they did; the Chapman committee in New York raised it through the Smelting Company and I don't know what means they did follow.

(Testimony of J. R. Winn.)

Q. They were giving securities other than securities of the Company, were they?

A. I couldn't say; Mr. Noble is here, you had better put him on the stand.

Q. You don't know as to how these committees that you were testifying to were trying to raise money? A. No; I am not acquainted with that.

Q. Don't you know it was from the sale of the new stock of the company?

A. I don't think it was the sale of the bonds of the company; there was no issue of bonds after the appointment of receivers—not to my knowledge.

Q. You don't know what security these people were offering to intending creditors as security for a loan of the money they were seeing to make?

A. I only know in a general way that the Smelting Company, from people *I that* I have had conversations with and letters that I have had, they will not risk the lending of money on any other security, I think, than the bonds and the stock; now, I don't know, but I am pretty sure that there have been no bonds issued or sold—no receiver's certificates sold, and I don't think they ever sold any of the Ebner stock except as it was brought in by the Chapman committee.

Q. This Chapman committee was trying to raise the money and failed to raise it, didn't they?

A. No; they did finally raise it.

Q. But they were the people who couldn't raise it in 1912 and [1119—969] 1913—isn't that right?

A. As I told you, up to my trip back there in 1913

(Testimony of J. R. Winn.)

there had been two committees, and there had been no unity of action with any of the bondholders; the proposition was taken up and I can state what was done while I was back there looking forward to the going ahead,—

Q. What I am trying to get at is this, Judge—the people who were trying to get the money and failed to raise the money were those two committees?

A. No; it was the receivers to a certain extent; I was back there and had a meeting with the receivers and a meeting with the bondholders.

Q. Prior to the time the receivers were appointed the money was being raised, and the parties that were trying to raise the money were those two committees?

A. Oh, no; not prior to the appointment of the receivers.

Q. Who tried to raise the money then?

A. Well, you see there was only a short time; Mr. Mackay closed down in October, and following shortly the receivers were appointed; I wasn't back east there and I don't know what they were doing.

Q. You were not east at all after the receivers were appointed?

A. I was there twice before but not after.

Q. When you were there the first time there was no effort made to raise money—is that right?

A. The work was going on there; that was the time that Mr. Mackay was driving this lower tunnel; he started, I remember, in December, 1910, and I was back in March, 1911; then they were selling some bonds.

(Testimony of J. R. Winn.)

Q. They were still raising money at that time?

A. Oh, yes.

Q. There was no difficulty in raising the money until you went [1120—970] there the second time?

Q. Well, as I say, the work was falling off, Mr. Hellenthal, and the last money that was paid here and the last pay-rolls, as I say, were taken care of, I think, by Mr. Hoops, and the work was falling off, and Mr. Mackay had on a very small crew driving, and he was running behind in money constantly.

Q. That was after you got back from the first trip?

A. Oh, as I say, the first trip I went back was in 1911, and the work was falling off, and that is the time that the report was going out, as I stated to you, about these lawsuits, and the means of raising money was dropping off.

Q. They were still raising money at that time, but not so much as they had been raising—that is right, isn't it?

A. Let me see—oh, yes; I went back there in March or April, and he closed down his work, I think, in the following October—oh, yes; they were getting some money then on the bonds when I was back there.

Q. And it wasn't until the second time that you went back there in the following year that the real difficulties in raising money had been encountered—isn't that so?

A. Well, as I say, those last payrolls—before Mr. Mackay stopped work he had experienced difficulty in getting money and those last payrolls were paid

(Testimony of J. R. Winn.)

by Mr. Hoops, I think.

Q. That was in the latter part of the year 1911?

A. That work was done prior to October, 1911, because there wasn't any work done in October, 1911.

Q. But it was about that time, wasn't it?

A. He quit work in October, 1911, and whatever was incurred on the property was incurred prior to that time.

Q. That is the first time that they had any difficulty in [1121—971], raising money?

A. They had difficulty all the time.

Q. You have never known of a company of that character not to have had any difficulty, have you?

A. Mr. Mackay, as I understood, was short of money after probably the completion of that flume up there; he was getting a little and doing what he could in driving that tunnel; and I don't know but what that money was raised, the principal part of it, before I went back there.

Q. You know Mr. Tripp, don't you?

A. Yes, sir.

Q. He was discharged in August, wasn't he, 1910?

A. I believe he testified so.

Q. He wasn't paid, was he, by the California-Nevada Copper Company?

A. No; he wasn't paid; he brought a suit.

Q. They didn't have the money at that time, did they?

A. I don't know; there was some defense to Mr. Tripp's suit, I think—there was some question about his salary.

(Testimony of J. R. Winn.)

Q. He wasn't paid and brought suit for his money?

A. He wasn't paid until he got a judgment against the company.

Q. They paid him—they made no defense, did they?

A. He finally got a judgment and they paid up; I think I defended that case.

Q. There was no defense to Mr. Tripp's suit, was there?

A. There was a defense to some portion of it.

Q. The whole amount was paid him, wasn't it?

A. I don't know whether the whole amount sued for was paid or not.

Q. Isn't it a fact that at the time they didn't have the money and Mr. Tripp was discharged?

A. No; I don't know about that. [1122—972]

Q. You don't know when you went back to New York the second time, in the year of 1912, they had difficulty in raising money?

A. Oh, the receivers were trying to raise money.

Q. That is the first real difficulty about getting money they had, wasn't it?

A. I have testified, Mr. Hellenthal,—you are argumentative in your question; as I told you, Mr. Mackay, after the latter part of 1910 was absolutely short of money to go on with any more work; the money was sloughing off and he was working with a small crew of men after the first of January, 1911, and they were experiencing difficulties, and his pay-rolls were running behind all the time, and finally someone had to come to his rescue; the crimps in the

(Testimony of J. R. Winn.)

money commenced in 1910 and kept sloughing off until he couldn't get anything.

Q. But when you went back in 1912 that was the first time in your personal contact with the people who were trying to raise money, that they had difficulty in getting it, that is right, isn't it?

A. No; it is not.

Q. When is the first time that you know of your own personal knowledge of the company having difficulty in raising money?

A. In March, 1911, we were endeavoring to sell bonds, and I went up to Boston to see if we couldn't convince those people that these lawsuits were not so serious, nothing to be scarry over, and their whole remark was that they wouldn't have anything to do with it.

Q. You were trying to sell the bonds of the California-Nevada Copper Company?

A. They were selling some few, I don't know what per cent they [1123—973] got rid of.

Q. They did sell some of the bonds of the California-Nevada Copper Company, did they?

A. I imagine they did.

Q. That was the method you had of raising money, by the sale of the bonds of the California-Nevada Copper Company?

A. As I told you, I had nothing in reality to do with the raising of the money at all after the receivers were appointed; as I told you, they sent for me to go back there in March, 1911, to see if I could not convince these people there that these suits were

(Testimony of J. R. Winn.)

not so scarry as the news had been circulated; we had meetings with prospective buyers, and we had meetings with parties who wanted to know whether the suits were real or not; you cannot go on the market and get money when there is a scare on.

Q. I will ask you this question, Judge, were you trying to raise money by the sale of the bonds of the California-Nevada Copper Company?

A. I wasn't selling any bonds; I never did sell any.

Q. Well, did the people who sent for you and for whom you were acting, were they trying to raise money by the sale of bonds of the California-Nevada Copper Company?

A. I told you three or four times they were trying to sell bonds.

Q. The bonds of the California-Nevada Copper Company?

A. Bonds issued under this mortgage; whether it is the Alaska-Ebner Gold Mines Company or the California-Nevada Copper Company, I don't remember.

Q. But it was those bonds anyway by the sale of which they were trying to raise money?

A. I have told you that a dozen times—yes.

Q. And those bonds were secured by that mortgage—that is right, [1124—974] isn't it?

A. I presume they were; I don't know what the mortgage is given for; I never went into that thing in detail.

Q. Well, how were you trying to raise money when you went back to New York the next time?

(Testimony of J. R. Winn.)

A. Well, the receivers were seeking a reorganization, dealing with the Barauch Brothers particularly; the receivers and myself had quite a little dealing, and were in hopes that Barauch Brothers would take the property over.

Q. Trying to sell the property at that time, were you?

A. Trying to reorganize it and put it on its feet; we were trying to convince them that the Ebner Company was not in such a bad shape, because this mortgage was only covering a small amount of its stock, and we thought we had the deal put through with Barauch Brothers, and they sent some inquiry out here and learned about these suits and then they dropped it, and I think when I went back there the second time the Chapman committee were trying to raise money too.

Q. Now, let's see; you went back and were trying to convince them, you say, that the Ebner Gold Mining Company was not in such bad shape because only a small portion of its stock was covered by this mortgage—is that right?

A. I wasn't trying that; I was trying to get the scare out of them on these suits—that was one of the things I went back there for.

Q. For how much money was this mortgage given?

A. Well, now, I don't know.

Q. Approximately how much?

A. I don't know.

Q. Several million dollars, wasn't it?

A. I don't know. [1125—975]

(Testimony of J. R. Winn.)

Q. The fact, however is, Judge, that the mortgage was so immensely large that the property covered by it wasn't anywhere near worth the stock for which the mortgage was given—isn't that true?

A. No one gave me any such excuse as that for not taking hold of the property.

Q. And the mortgage only covered a small portion of the stock of the Ebner Company?

A. I think it did when I made that second trip back there.

Q. Only 30 per cent of the stock of the Company?

A. I wouldn't say what per cent—it was less than half.

Q. And the excuse that they gave you for not being able to raise the money was because there were so many suits pending up in the Alaska courts—is that right? A. Yes, sir.

Q. Now, Judge, when was the first suit commenced? A. Well—

Q. I will ask you a leading question—wasn't the first suit commenced on the 21st day of August, 1910, the first suit relating to any matters up here at all?

A. I forget; the record will show; I think probably the first suit commenced was that pleading that you offered in evidence.

Q. The first suit that was commenced in relation to any of these matters was commenced by the Ebner Gold Mining Company vs. the Ebner-Juneau Gold Mining Company, wasn't it?

A. Yes; to prevent you from going on and locating

(Testimony of J. R. Winn.)

claims over our claims.

Q. The first suit was to prevent the Alaska-Juneau Company from appropriating the water of Gold Creek, wasn't it?

A. Why, the complaint is there, and it will show; if you will show me the pleading I will tell you.
[1126—976]

Q. That was the object of this first suit, wasn't it, to prevent the Alaska-Juneau Company from appropriating the water of Gold Creek?

A. I think that first suit was a suit to enjoin you people from trespassing upon some of the property owned by the Ebner Gold Mining Company—the complaint will show.

Q. Hearing was had upon an application for an injunction in that suit, wasn't it?

A. I think Mr. Burton attended to that first hearing—there are so many of these I can't tell which is which.

Q. Wasn't it this way, Judge—didn't you personally prepare the papers, and Mr. Burton attended the first hearing and made the first application for a preliminary injunction, which was denied by Judge Lyons, and then did you not return to town and make a second application for an injunction which was also denied by Judge Lyons?

A. If that is the case I attended one hearing—I don't know whether that is the case or not—the record will show—I think that is right, he denied our injunction; there are ten suits here; we did bring a suit in ejectment to get you off of the Lotta and

(Testimony of J. R. Winn.)

the Parish No. 2 claim, and that suit, I think, was commenced to follow out our remedy and try to get the relief we tried to get in the other suit; now, there are ten of these suits—

Q. The first one was a suit for an injunction brought by you and the injunction was denied, and then you commenced a suit over the same subject matter in ejectment, didn't you?

A. Yes; and ejected you from the Lotta claim.

Q. You brought a suit in ejectment then to eject us from the Lotta and the Parish No. 2?

A. Yes, sir. [1127—977]

Q. That was another suit brought by the Ebner Gold Mining Company against the Alaska-Juneau Company, wasn't it?

A. That is the suit that you have pleaded in this case in your reply.

Q. That was the second lawsuit that was brought between these companies, was it not?

A. Well, now, you will have to look at the records to find out.

Q. Give me the best recollection you have on that, Judge?

A. No, I won't testify on it because the records are right here.

Q. Isn't it a fact that the first two lawsuits, at least, were brought by the Ebner Company against the Alaska-Juneau Company?

A. We had to do it to get you people off the property.

Q. You brought them, didn't you?

(Testimony of J. R. Winn.)

A. I don't know whether the first two suits were brought by us or not; we did bring the two that you have mentioned.

Q. In the first one you didn't get the relief you sought and then you brought another one to get it, didn't you? A. I think I told you that.

Q. In the second suit it was shown that a small portion of the Alaska-Juneau Company's dam extended over and slid over onto the Lotta claim on one end, didn't it?

A. It showed that you had filed your Oregon lode claim over the Lotta and you had filed your other claim over it; that is, the same suit declared that both of those locations were invalid and left us the Lotta claim. Now, as to the extent that that dam was over onto the Lotta claim, I don't know anything about it any more than you do, which I got from the testimony and evidence, and which resulted in Judge Cushman's order and decree, which stands before the Court in your reply in this case. [1128—978]

Q. The relief you asked for, as far as it related to the Parish No. 2 was denied you in that judgment, wasn't it?

A. The judgment will speak for itself.

Q. You know, don't you?

A. Well, there is a question.

Q. Anyhow, Judge Cushman held that *you* Parish No. 2 claim, which you relied upon as one of the pieces of property from which you wanted to eject us, and upon which the entire flume of the Alaska-

(Testimony of J. R. Winn.)

Juneau had then been built, was not a valid location?

A. The judgment is there before Judge Jennings.

Q. You were not granted relief then, that you testified to a minute ago in response to a question that did not call for such an answer, did you?

A. You were asking me the relief that was granted in that suit, and I was giving you the whole relief, the findings of the court and the judgment; that was the ultimate result of that suit, and there is a finding there on all three of the claims as to the legal effect of it, and I presume that will be determined by this Court in this suit.

Q. But in any event that case was tried out, and whatever the decree of Judge Cushman was it was appealed from and affirmed, was it not?

A. It was appealed and reversed—there are a number of causes in regard to the Parish claim; however, that is pleaded here in your reply, and is before the Court in your reply.

Q. What is the next suit that the Ebner Gold Mining Company brought against the Alaska-Juneau Company? A. I couldn't tell you, sir.

Q. Now, what are the suits that were brought by the Alaska-Juneau Company against your Ebner Company? [1129—979]

A. Well, they are here.

Q. What is the first suit?

A. I think I can give you a list of them.

Q. The first suit that was brought was an action brought to enjoin you from breaking up the flume on the Oregon claim on the flume grade of the

(Testimony of J. R. Winn.)

Alaska-Juneau Company, wasn't it?

A. I couldn't tell you without looking at the record.

Q. You answered that in response to Mr. Burton's question, didn't you?

A. He handed me the papers to look over.

Q. Such a suit was brought about that time, wasn't it?

A. I think there was a suit brought while we were working on what is called the Parish claim; you brought a restraining order; I think, on that same proposition that you had some of the parties arrested and they were afterwards dismissed.

Q. That restraining order was granted by the court—that injunction was granted, wasn't it?

A. You will have to look at the records.

Q. Don't you know whether that injunction was granted or not?

A. I know this about it that we stopped work—we had to stop work on that place, and we did stop work; I don't remember the order of the court.

Q. Another suit was brought against you, an action to quiet the title to the Oregon claim, wasn't it?

A. Well, the records will show; if you will show me the papers I will tell you.

Q. The Alaska-Juneau Company were claiming the piece of ground under the Oregon location that you were claiming under the Parish, were they not?

A. I don't know anything about that. [1130—980]

Q. You don't know, Judge Winn, that the Alaska-

(Testimony of J. R. Winn.)

Juneau Company were claiming the ground under the Oregon location that you were claiming under the Parish?

A. Why, if you will present me the papers—I cannot go over these ten suits and tell you what it contains in each one unless I have the papers.

Q. I didn't think there were ten suits?

A. I have ten here; if you want the names, why, the Alaska-Juneau Company against the California-Nevada Copper Company—

Q. I wish you would give them to me commencing with the first date?

A. I will not give them to you that way because I haven't the information.

Q. I want the cases in the order they were brought.

A. I won't give them to you; you have got to select them yourself.

The COURT.—Well, the cases were brought in the order in which they were numbered; give him the earliest number—begin with the smallest number.

A. It seems like this is the first one I have of record here—803 is the lowest I observe on this list; that is the Ebner Gold Mining Company against the Alaska-Juneau Gold Mining Company; and the next is 804, which is Tripp against the Alaska-Juneau Gold Mining Company; 812, which is the Alaska-Juneau Gold Mining Company vs. Angus Mackay, Behrends and others; 823, is the Alaska-Juneau

(Testimony of J. R. Winn.)

Gold Mining Company against the California-Nevada Copper Company and the Ebner Gold Mining Company; 826 is the Alaska-Juneau Gold Mining against the Ebner Gold Mining Company; 828 is the Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company and others; the record I have in my hand don't show how many [1131—981] it is against; 835—I think that is the appealed case, the one we have been talking so much about—is the Ebner Gold Mining Company against the Alaska-Juneau Gold Mining; 938 is the Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company; and 939 is the same title.

The COURT.—Is that all?

A. That is all I have; I didn't prepare this myself.

Q. Now, those last two cases, let us speak of those first—those last two cases are adverse suits brought by the Alaska-Juneau Company to adverse a patent location made by you to the Parish No. 2, aren't they? A. I think they are.

Q. That patent application was made by you when? A. I do not know.

Q. When were the adverse suits commenced?

A. I don't know.

Q. They are comparatively recent suits, aren't they?

A. I cannot tell you without the records.

Q. The patent application was made after the decision of Judge Cushman to the effect that the Parish was an invalid location?

(Testimony of J. R. Winn.)

A. I don't know that; I didn't tax my memory with it.

Q. You don't know when those suits were brought with reference to the decision of Judge Cushman?

A. I don't—I didn't tax my mind with it.

Q. You do know, however, that the adverse suit was brought against the patent application that you have made, don't you?

A. I answered that once.

Q. 812—that is a suit for a fraction of ground near the Ebner dam that was located by the Alaska-Juneau as the Russell lode claim and by your people as the Fractional placer, isn't [1132—982] it?

A. There is such a suit—what the property is I don't know.

Q. That is one of the suits?

A. That is one of the suits.

Q. It is still pending? A. It is still pending.

Q. And the other cases have been practically disposed of under the decision of Judge Cushman?

A. I must say that they are here, and the record is here and speaks for itself; I don't know whether I will want to prosecute these suits or not.

Q. What cases have you still to prosecute against the Alaska-Juneau Company?

(Not answered because of objection.)

Q. Well, Judge, there are some cases pending yet, you think, that have not been disposed of by Judge Cushman's decision?

A. I haven't looked into the issues of those cases, Mr. Hellenthal, to see what is going to be done with

(Testimony of J. R. Winn.)

them; I don't know, and wouldn't commit myself, because I haven't examined the issues of those cases for more than a year.

Q. You know this, Judge, that the case brought by the Ebner Company against the Alaska-Juneau Company involving the Parish No. 2 involved practically the same issues as the case brought by the Alaska-Juneau against the Ebner concerning the Canyon lode, and the case brought by the Alaska-Juneau against the Ebner Company concerning the Oregon lode—they are all practically the same, and a decree in one case will settle a whole lot of cases bearing upon the same issues—isn't that right?

A. I told you I hadn't examined those pleadings, and I wouldn't undertake to tell you, unless you hand me the papers, what [1133—983] is at issue; I haven't seen them for over a year, and I wouldn't know what any of these papers contained unless you direct my mind to some case that has been tried; I have never looked over the papers to conclude what is going to be done with them.

Q. Will you, when court adjourns, look over these and see?

A. If you will present the papers to me, Mr. Helenthal, and go over them with me I will try and give you the information you want, but I won't go through them at adjournment, because I haven't time—I have too much other business to attend to.

(Whereupon court adjourned until 10 o'clock tomorrow morning.)

(Testimony of J. R. Winn.)

MORNING SESSION.

August 6th, 1914, 10 A. M.

J. R. WINN, on the witness-stand.

Cross-examination (Cont'd).

(By Mr. HELLENTHAL.)

Q. You remember, Judge, that after the injunction suit was brought by the Ebner Gold Mining Company against the Alaska-Juneau Gold Mining Company, which was brought to enjoin the Alaska-Juneau Company from going upon the ground which the Alaska-Juneau Company claimed under the Oregon location and which the Ebner Company claimed under the Parish location—after that injunction hearing was had, you remember that the Alaska-Juneau Company then brought the two suits to quiet title against the Ebner Company, one was to quiet title to the Oregon claim and the other was to quiet title to the Canyon, which was an adjoining claim to the Oregon—you remember [1134—984] that, don't you?

A. If you will call the number of the—there are two suits of that kind, Mr. Hellenthal—if you will show me the papers or let me see the papers I could very closely tell you; I haven't burdened my mind with all the facts of those pleadings.

Q. Judge, I now call your attention to the suits 826-A and 828-A—I think you will find those to be Oregon and Canyon cases.

A. Yes; 828-A is a suit brought by the Alaska-Juneau Gold Mining Company against several defendants, including the Ebner Gold Mining Com-

(Testimony of J. R. Winn.)

pany, Mackay, and so forth; it is in the nature of a suit to quiet title to the Canyon claim—that is 828-A.

Q. And 826-A is to the Oregon claim, isn't it?

A. Yes; that is a suit of the Alaska-Juneau Gold Mining Company against Angus Mackay and some other defendants, including the Ebner Gold Mining Company.

Q. To quiet title to the Oregon claim?

A. I cannot ascertain from your complaint which one of the Oregons you mean.

Q. It is one of the Oregon claims?

A. It is one of the Oregon claims; I cannot tell whether it is the Datson or Corbus.

Q. It is the same ground covered by those two claims anyway, isn't it?

A. The ground, I think, is about the same.

Q. After the bringing of these cases, the Ebner Gold Mining Company brought 835-A, which is a matter of ejectment that includes the ground covered by both of these cases, does it not, the Lotta and the Parish?

A. That suit in ejectment was to eject the Alaska-Juneau Company from the Lotta and the Parish No. 2; and, of course, [1135—985] it included, I don't know how much of your Oregon—it must have included all of your Canyon; I am not sure about that.

Q. It included a large portion of the Oregon and the whole of the Canyon, didn't it?

A. It covered such portion of it as Mr. Wettrick's

(Testimony of J. R. Winn.)

testimony will disclose; the Parish No. 2 or the Lotta, I don't know how much it covers.

Q. The suit over your title is only over one of the claims—you didn't bring two suits, but only one suit, did you? A. Yes.

Q. And here we have practically the same thing covered in two suits?

A. I don't know how much of the Oregon is outside the Parish.

Q. Outside of that part of the Oregon that conflicted with the Parish and that part of the Canyon that conflicted with the Lotta or the Parish—that was all litigated in this case, 835-A, wasn't it?

A. Yes; that is true, but whether or not there is any part of the Canyon or Oregon outside of the Lotta and the Parish No. 2 I am not able to state; that is the reason I am unable to state whether these two suits now pending ought to be dismissed or not?

Q. One of the defenses, if you will remember, set up to your suit 835-A, referred to another action pending with reference to these suits, didn't it?

A. Judge Jennings has the pleadings before him and can see what was set up under the pleadings.

Q. You recollect the fact that that defense was waived and we went to trial in 835-A so that the issues might be tried in that case? [1136—986]

A. There was some kind of a waiver, but just the exact extent of it, I couldn't say at this time; the records will disclose.

Q. Then that case went to trial, didn't it?

A. Yes; that suit evidently was tried.

(Testimony of J. R. Winn.)

Q. And there was nothing more done about that litigation up to date?

A. I don't know; I don't think there has been much done in these two suits you have just referred my attention to; I don't know but what they are at issue—no, these cases have not been tried.

Q. I now call your attention to cases 938-A and 939-A—do the complaints show when those were filed, Judge?

A. The summons was issued in 939-A on the 1st day of August, 1912.

Q. And the other suit, 938-A, was the same thing, wasn't it? A. 1st day of August, 1912; yes.

Q. Those are the two cases that you referred to yesterday, which were adverse suits filed in the land office, brought to adverse the Parish No. 2 location made by the Ebner Company, aren't they?

A. I don't know without looking whether these are both adverse suits or not.

Q. One is the Corbus-Oregon and the other is the other Oregon, isn't it?

A. Yes; you are claiming in suit 938-A under the Datson location of the Oregon, which was made on the 20th day of July, 1910, for whatever relief you are asking; I thought you probably commenced those suits and then filed an adverse and amended your pleadings in them, but I am not sure of that; you rely on the Datson claim for whatever relief there is in that suit; the other suit you plead the location made of the [1137—987] Oregon claim by J. P. Corbus on the 31st day of October, 1899.

(Testimony of J. R. Winn.)

Q. They are both suits to quiet title to the ground, one under the Corbus and the other the ground embraced within the Datson Oregon and are both brought pursuant to adverse filed in the land office upon application for patent of the Parish No. 2.

A. I think you filed an amended complaint in this one.

Q. I think not, Judge.

A. Yes; 839-A, you have evidently got attached here to your pleadings—I think those grew out of that adverse claim; anyway, you are claiming title under those two locations.

Q. And they were brought right after the adverse was filed in the land office on the application for patent of the Parish No. 2—in the land office, weren't they?

A. Oh, not within the statutory time—I suppose they were filed; I don't know; Mr. Burton filed his answer and he may have raised the point that you didn't file them in time, but they were filed, I think, on some adverse claim—that is my understanding without going through the pleadings, if I am not mistaken.

Q. Now, as to the other case, 812-A, directing your attention to that, that is the litigation over the piece of ground up near the Ebner dam which is claimed by the Alaska-Juneau Company under the Russell lode claim and by the Ebner under the Fractional location; is that right?

A. Yes; you are claiming title under the Russell lode claim.

(Testimony of J. R. Winn.)

Q. That is a suit to quiet title that has not been disposed of?

A. No; this case has not been disposed of. [1138—988]

Q. It is still pending? A. It is still pending.

Q. The other case No. 823-A, entitled the Alaska-Juneau Gold Mining Company against the California-Nevada Copper Company—that is the case you referred to as being the suit brought by the Alaska-Juneau Company to enjoin the dumping of rock on the flume line that was then in course of construction, is it not?

A. Yes; you predicate your title on one of the Oregon claims, and the prayer of your complaint asks that the California-Nevada Copper Company, and the Ebner Gold Mining Company and other defendants be restrained from destroying your flume line.

Q. In that case an injunction was issued by the Court, was it not, Judge?

A. I will have to look over the records, Mr. Hellenthal; the record will disclose it; if you say there is a restraining order in there it will save the trouble of looking through it.

Q. Now, those were the only cases pending between the parties you have referred to, were they not?

A. I don't know whether you have gone over that whole list or not, Mr. Hellenthal, without I had the list here.

Q. You cannot think of any others, can you?

(Testimony of J. R. Winn.)

A. How many have you got there, nine suits?

Q. Nine suits.

A. Oh, that is the nine I mentioned yesterday; I think those are the ones I have reference to.

Q. I have called your attention to all the papers and suits that are now pending between the companies, haven't *it*?

A. All that I remember just now. [1139—989]

Q. That is the litigation to which you have referred? A. Yes.

Q. Judge, just let me ask you to identify this mortgage to which you have referred, calling your attention to the records of the Juneau Recording District, page 351 of Book B of Mortgages, where a mortgage is recorded from the California-Nevada Copper Company to the Standard Trust Company of New York and Edward M. F. Miller, Trustee, mortgage or deed of trust, dated December 15th, 1907—is that the mortgage to which you referred yesterday in your testimony?

A. That must be the one, I don't know of any other mortgage except one that is on record here; I have never examined the record to ascertain; I had a copy of it sent me; I only know one such mortgage in existence.

Q. Then, to the best of your knowledge, that is the one? A. I suppose so.

Mr. HELLENTHAL.—I will offer this in evidence as part of the cross-examination of Judge Winn.

(Testimony of J. R. Winn.)

(Whereupon said mortgage from the California-Nevada Copper Company to the Standard Trust Company of New York, as appearing in Book B of mortgages, pages 351, 352, 353, 354, 355, 356, 357, 358, 359, 360 and part of 361, was received in evidence and marked Plaintiff's Exhibit No. 39.)

Mr. HELLENTHAL.—That will be all the questions.

Redirect Examination.

(By Mr. BURTON.)

Q. Do you know, Judge Winn, what amount this mortgage is given for?

A. I didn't *off* the amount; it will show in the mortgage, but I do know this, that there was only \$750,000.00's worth of [1140—990] bonds sold under that mortgage.

Q. You know there were only \$750,000.00's worth of bonds sold?

A. Something less than \$750,000.00's worth of bonds sold under that mortgage.

Q. Does this mortgage cover any other property than the stock of the Ebner Gold Mining Company?

A. I suppose it shows for itself in there, if it does.

Q. Mr. Hellenthal questioned you about cause No. 938—A—I will ask you if you know whether or not that suit was brought subsequent to the decision of Judge Cushman in 835—A.

A. I am of the opinion that it was; the judgment, however, of Judge Cushman that you have reference to is set up in the reply of Mr. Hellenthal in this case we are trying now; it is my opinion that this suit

(Testimony of J. R. Winn.)

was brought after that decision was rendered.

Q. What is the date that that suit was brought?

A. The date of the summons is August 1st, 1912.

Q. Isn't that suit, Judge, an adverse suit brought in support of an adverse filed in the land office; doesn't it so state in that complaint?

A. Yes; it is brought on an adverse claim—it is stated in the pleadings; the adverse claim claims to have been filed on the 17th day of July, 1912.

Q. And that complaint sets up the Datson Oregon and also the Corbus Oregon, does it not, or just one of the Oregons?

A. I think this only sets up the Datson Oregon, and the other one that Mr. Hellenthal called my attention to set up the other one, I think.

Q. Was the Datson Oregon involved in cause No. 835-A, decided by Judge Cushman?

A. Yes; the same Datson claim that is referred to in Mr. Hellenthal's [1141—991] reply, and which is referred to in Judge Cushman's findings and decision in that case.

Q. Do you remember from your recollection, Judge, whether or not in the answer in cause No. 835-A the Datson Oregon and the Corbus Oregon were set up as a defense against the Ebner Company's claim to the Parish No. 2?

A. Judge Cushman passed upon both of those locations in his decision; those claims are set up in the answer and they are referred to in Judge Cushman's opinion and findings; that is all pleaded in Mr. Hellenthal's reply in this case we are trying now—

(Testimony of J. R. Winn.)

the pleadings are all set up in this case.

Q. Those matters are a part of the allegations set up in the reply in this cause, are they not, Judge—the matters and the findings of Judge Cushman?

A. Oh, yes; in the reply in this case.

Q. I will now hand you the papers in cause No. 939-A—Mr. Hellenthal asked you a while ago if that is not a suit to quiet title and not a suit in support of any adverse filed in the land office?

A. Yes; that is true—I thought it was one of these suits that we claimed under that head; it is a suit to quiet title to the J. P. Corbus Oregon lode claim, location made the 31st day of October, 1899.

Q. Do you know, Judge, whether or not that is the same Corbus Oregon claim that Mr. Bradley testified to in this case as having been abandoned in 1904?

A. It is the one he testified concerning.

Q. Answering Mr. Hellenthal's question that he propounded to you, you stated something about Mr. Hoops having advanced some money—who was Mr. Hoops—at that time had he any [1142—992] connection with the company?

A. Yes; Hoops was, I think, a creditor stockholder and bond holder.

Q. Now, I will hand you papers in cause No. 803-A and ask you to state to the Court just what that suit is, the date of the complaint and the cause of action?

A. This is a suit that was brought, which Mr. Hellenthal has referred to, asking for a restraining order, brought by the Ebner Gold Mining Company against the Alaska-Juneau Gold Mining Company

(Testimony of J. R. Winn.)

and some other defendants; the Ebner Company sets up a lot of mining claims which they claim to be the owner of—I don't know how many of these claims it sets up are referred to in Defendant's Exhibit "S" in the case we are trying now, but it sets up quite a number of those claims—at least all the patented ones and some of the unpatented claims; then it claims that the defendant was trespassing upon this property, and refers to the fact of the posting of the L. D. Mulligan notice, and other matters of trespass upon this property belonging to the company, and asks for a restraining order restraining the Alaska-Juneau Company from continuing such trespass; the complaint was sworn to on the 25th day of August, 1910, and it was filed on August the 25th of the same year.

Q. Did you draw up that complaint, Judge Winn, do you remember?

A. I don't know; I rather think I did.

Q. Is that the same Mulligan notice which is referred to and which has been testified to in this case?

A. It is the same one.

Q. Do you remember, Judge Winn, whether or not you attended to the first hearing in that cause Mr. Hellenthal questioned you about?

A. Where was that first preliminary hearing had?
[1143—993]

Q. In Juneau, or did I attend that first hearing?

A. There was one hearing heard on a restraining order in Ketchikan, and I am somewhat befuddled on the two.

(Testimony of J. R. Winn.)

Q. I will ask you, Judge Winn, whether or not you remember attending the final hearing in that case, when Judge Lyons suggested that we bring an action of ejectment?

A. I remember that he had a copy of Judge Lyons' decision in that case; I don't remember whether he filed a written decision or not, but it was taken down by the stenographer and we preserved it; he held that our remedy was at law, ejectment, and he would not grant the restraining order.

Q. I will hand you the papers in case No. 812, and ask you to give the date and state as near as you can remember what the cause of action is?

A. This is the suit that Mr. Hellenthal referred to as brought by the Alaska-Juneau Gold Mining Company against the Ebner Company, Mackay and others to quiet title to the Russell lode claim, and the Ebner Company is claiming that ground under the Fractional placer claim that has been referred to in the testimony in this case.

Q. The Fractional placer claim? A. Yes.

Q. What claim do they set up there?

A. The Alaska-Juneau, they set up the Russell quartz claim.

Q. You heard the testimony in this case that the Fractional placer claim had been located quite a number of years ago?

A. Yes; I heard the testimony—however, it is more in the form, I think, of a location notice you offered on that claim.

Q. There is in evidence, a location notice?

(Testimony of J. R. Winn.)

A. That is the location notice.

Q. I will ask you if you know whether this Russell claim that is asserted against the Fractional claim in 812-A, covers [1144—994] the same ground, or part of the same ground, as the Fractional placer?

A. That is our defense in the case—we claim that.

Q. You know, do you, when this Russell lode claim was located?

A. That claim was located by the Alaska-Juneau Company sometime, I think, the latter part of September, 1910; that is, located, as I understand, for them; I don't know whose name it is located in; they are claiming it is their property in this pleading.

Q. It was located the latter part of September, 1910?

A. I think so; yes—to the best of my knowledge.

Q. Where is this so-called Russell claim with reference to where Harri's tent was pitched in October, 1910?

A. I think that is the claim that Mr. Kinzie testified that they sent him up to to have the tent put on, as appears in the testimony in this case.

Q. Do you know anything about the grade of the Ebner Company in September, 1910, of your own knowledge?

A. Oh, I was up there a lot of times, but I don't remember exactly as to the date; I testified that I posted that water location of the Ebner Company on the 17th of August, and I stated what I saw then was done.

Q. I will hand you the papers in 823-A and ask

(Testimony of J. R. Winn.)

you the date of the bringing of that suit and the cause of action?

A. This is the suit that I answered Mr. Hellen-thal's question in regard to, that was brought to restrain the California-Nevada Copper Company and the Ebner Company from dumping on the flume of the Alaska-Juneau Company; they seemed to be claiming title, or the allegations are that they were claiming it under the Oregon claim.

Q. Do you remember the testimony in the case with reference to a tunnel below which this particular grade set forth in [1145—995] this action is situated?

A. That is the tunnel that Mr. Wettrick testified they were working on that caused the arrest.

Q. And they were working on that prior to the time the grade reached that point and prior to the time they put in their flume there, were they?

A. His testimony there will say, I don't remember it in detail.

Q. I will hand you the papers in 826-A and ask you to give the date of the complaint and also state briefly what is the cause of action?

A. I did give the date of this one to Mr. Hellen-thal when he asked me about the filing of the complaint, and this is the one that I identified to Mr. Hellen-thal as being the suit brought by the Alaska-Juneau Gold Mining Company against Mackay and the Ebner Gold Mining Company and others to quiet title to one of the Oregon claims—whether it is the

(Testimony of J. R. Winn.)

Datson or Corbus does not appear upon the face of the pleadings.

Q. That was in 1910—November 17th, 1910?

A. That is the date.

Q. I will now hand you the papers in 828-A, and ask you to state briefly what that cause of action is, and also the date of bringing that suit?

A. The complaint was filed on November 21st, 1910; it is a suit by the Alaska-Juneau Company against the Ebner Company and others; the plaintiff claims title under the Canyon lode claim, and asks to quiet title to it.

Q. Now, the papers in 835-A—that is the ejectment suit, is it not, that has been referred to several times in this case?

A. Yes; that is the ejectment suit we brought after Judge Lyons denied the restraining order in the other suit, and that is [1146—996] pleaded in the reply of Mr. Hellenthal in this case that we are now tryng.

Q. I will ask you, Judge Winn, whether or not in cause 803-A, which was brought August 25th, 1910, you remember whether they asserted title to either one or both of the Oregon claims?

A. No; I don't remember, without seeing the pleadings, Mr. Burton. There are so many of these papers.

Q. I will hand you the answer and ask you to which Oregon they assert title in that case?

A. By a short examination of the pleadings I see

(Testimony of J. R. Winn.)

nothing of any Oregon claim mentioned in there except the one that was located by Corbus in 1899; it is a long pleading, but in running through it I didn't see any other Oregon claim.

Q. Now, you testified regarding the Tripp case, 804-A—I think you said that Tripp took up certain claims as trustee for the California-Nevada Copper Company and the Alaska-Ebner Gold Mines Company in connection with the Ebner Company's property—is that true?

(Objection and question not answered.)

Q. And those claims have since been conveyed to the Company, have they not?

A. The Taku Queen is one; Mr. Tripp brought that suit based upon the Auk Chief and the Alice placer claims; those are the same claims that are mentioned in that deed of Mr. Tripp's, which has been deeded to the Ebner Gold Mining Company.

Q. Now, Mr. Helenthal asked you in cause 835-A, if we didn't strike out, I believe, certain causes of action—do you remember about that?

A. He asked me some question like that.

Q. Now, Judge Winn, I will ask you if you stated that this litigation [1147—997] that you have referred to, that you know of your own knowledge interfered with the raising of money to carry on this work—I will ask you if there is anything else you know of that also had an effect of interfering with the raising of money to carry on the work?

A. Of course, I said the litigation, and then the title was clouded—these claims had been filed over

(Testimony of J. R. Winn.)

the Ebner property and had clouded the title, and of course whether the suits were meritorious and what the outcome would be is a matter that has to be considered when you are raising money; it is a difficult matter to raise money when the title is clouded and suits are pending.

Q. Do you know of any particular instance that occurs to your mind where this litigation was retarding the obtaining of money for the purpose of carrying on the work?

(Question objected to.)

The COURT.—It would not be redirect, but if you wish to direct his attention to that particular point you may ask him the question, but it will be considered as his examination in chief and will be subject to cross-examination again.

A. Why, it was on a great many occasions that I could point out, of course.

Q. I would like you to mention one instance, if you remember a single instance, that occurred while you were back in New York.

A. I remember an instance while we were dealing with Barauch Brothers, Mr. Martin, who was receiver then, and Mr. Smith—that was before the appointment of the receivers in the foreclosure proceedings and the proposition of the reorganization of the company on the plan we had decided—that concern seemed to be agreeable and everything was all right to all parties until the matter of the title came up, and it broke [1148—998] off all further negotiations.

(Testimony of J. R. Winn.)

Mr. BURTON.—I think that is all.

Recross-examination.

(By Mr. HELLENTHAL.)

Q. Judge, just a question, that adverse suit that Mr. Burton was inquiring about, that adverse suit between the Oregon and the Parish—that second adverse suit, the complaint does substantially state that it was brought pursuant to an adverse in the Land Office—you know that as a matter of fact, don't you?

A. I don't know any more than what the pleadings show, Mr. Hellenthal; the fact is, Mr. Burton has practically had charge of those two cases, and I would have to look at the pleadings to be sure of that.

Q. You have no personal familiarity with those cases?

A. I have no familiarity with those two suits; Mr. Burton has had charge of them.

Q. The opinion that you referred to, of Judge Lyons, upon the subject of this injunction is the one that is found in the record of the case of 803-A, marked here "Oral Opinion," is it not—that is a transcript of that opinion, isn't it?

A. That is the one—you undoubtedly have got the certificate of Mr. Robertson, the reporter—that is the only opinion in cause 803-A, and I think that is a transcript of it.

Mr. HELLENTHAL.—I offer that in evidence, if your Honor please, the opinion of Judge Lyons

(Testimony of George R. Noble.)

which the witness has referred to in his examination.

(Whereupon said opinion was received in evidence and marked Plaintiff's Exhibit No. 40.)

Mr. HELLENTHAL.—That's all.

(WITNESS EXCUSED.) [1149—999]

Mr. BURTON.—In connection with the testimony of Judge Winn in which he states that the opinion of Judge Lyons resulted in bringing the action No. 835-A, I desire to offer in evidence the opinions of Judge Lyons—there was one opinion at the time the order to show cause was presented, and another one at the time the preliminary hearing was had.

The COURT.—Both the opinions of Judge Lyons in cause No. 823-A will be admitted.

(Whereupon said opinions were received in evidence and marked Defendant's Exhibit "I-2.")

Mr. HELLENTHAL.—I believe that opinion is given in 803-A, 804-A and 823-A?

Mr. BURTON.—That is correct—the cases were consolidated. [1150—1000]

The defendant, to further maintain the issues on its part, introduced as a witness GEORGE R. NOBLE, who first being duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of George R. Noble, for Defendant.

Direct Examination.

(By Judge WINN.)

Q. Your name is George R. Noble? A. Yes.

Q. Where do you live now, Mr. Noble?

(Testimony of George R. Noble.)

A. Juneau.

Q. How long have you been making Juneau your home? A. Two years.

Q. Where were you living prior to that time?

A. Boston, Massachusetts.

Q. Mr. Noble, when did you first have anything to do with any dealings concerning the property of the Ebner Gold Mining Company?

A. In 1910—the early part of 1910.

Q. Were you in Alaska at that time, or in the east?

A. I was in the east.

Q. Just state briefly to the Court what connection you had with the business of the Ebner Gold Mining Company, the Alaska-Ebner Gold Mines Company, or either of them, that have been connected with this property that is indicated on Defendant's Exhibit "S"?

A. At that time I became a bondholder of the company, and was soliciting money to carry through its plans—primarily interested in soliciting money to carry its plans to completion. [1151—1001]

Q. To carry through what plans, Mr. Noble?

A. At that time the plans were to build a 200-stamp-mill and to operate the Ebner mine.

Q. You have heard the testimony in this case, haven't you, Mr. Noble? A. Some of it.

Q. To open it up on the plans that have been testified to in this case?

A. That I believe were the plans; yes, sir.

Q. Now, you say you were a bondholder—were you a bondholder under this mortgage which Mr.

(Testimony of George R. Noble.)

Hellenthal has offered in evidence in this case?

A. I was.

Q. When did you first come to Alaska in connection with any business of the Ebner Gold Mining Company, or its properties? A. July, 1912.

Q. What was your purpose in coming here?

A. I was sent here representing a majority of the bondholders of the Alaska-Ebner Gold Mines Company to ascertain the true situation of affairs.

Q. To ascertain the true situation of affairs—you mean the condition of the property and everything connected with the affairs?

A. Everything connected with the details here.

Q. Had you been informed before you came here of any litigation that was pending or that was threatened against the property of the Ebner Gold Mining Company? A. I had.

Q. How long did you stay here in ascertaining the facts that [1152—1002] you were sent here to ascertain?

A. I think I left here, Judge, some time about the 10th of August, the following month—about six weeks, if I remember right.

Q. With whom, if anyone, did you go over the situation, so far as the details of the property were concerned at that time?

A. I went over the situation with you, and at that time made inquiries of Mr. Tripp and from anyone that I could learn anything particular about the property here.

(Testimony of George R. Noble.)

Q. You say you left here about what time?

A. About the 10th of August, if my memory serves me right.

Q. 1912? A. 1912.

Q. The property was then in the hands of receivers?

A. The property was in the hands of receivers; yes, sir.

Q. Now, I will ask you when you returned to the east, Mr. Noble, if there was any committees appointed or formed consisting of the bondholders for the purpose of looking towards the raising of money to do the work that had already been begun on this property? A. There were.

Q. Do you remember the names of the committees that were then at work on the proposition which I have just asked you about?

A. Yes, sir; there was the Chapman committee and the Cumnock committee.

Q. The Chapman committee, what would you say of its general efforts in regard to getting hold of the outstanding bonds?

A. Its final efforts were that it secured 97-7/10 per cent, if my memory serves me right, of the entire outstanding bonds of the Alaska-Ebner Gold Mines Company prior to the sale of this property. [1153—1003]

Q. Do you remember, Mr. Noble, approximately how many, or what amount of bonds were sold under this mortgage that Mr. Hellenthal has offered in evidence in this case?

(Testimony of George R. Noble.)

A. They were between seven hundred and seven hundred and fifty thousand dollars—not in excess of \$750,000.00 of bonds sold.

Q. Now, you spoke of some foreclosure sale that took place in New York, were you there when the sale took place?

A. I wasn't present when the sale took place.

Q. You were back east when the sale took place?

A. I was in New York at the time.

Q. Now, I will ask you over all the time from your first trip up here down to the present time, if you have been connected one way or another with this property of the Ebner Gold Mining Company?

A. I have represented the majority of the bondholders as their agent here, and I represent the Chapman committee at the present time.

Q. I will ask you, Mr. Noble, if you have ever disbursed any money in the carrying out of this plan of the opening up and development of the Ebner Gold Mining Company's property? A. I have.

Q. Do you remember about how much has been expended by you?

A. Approximately \$40,000.00—from the time it was turned over—do you mean directly on the Ebner property? About \$40,000.00 up to the first of November, when Mr. Muir was put in charge of the work and given the official superintendence of it.

Q. Do you know what the principal part of this expenditure that you made was for?

A. I can show what it was all made for; the principal part of [1154—1004] it was preparing and

(Testimony of George R. Noble.)

installing the machinery, purchase of supplies, getting ready to operate and driving this tunnel to open up these properties.

Q. What proportion of that amount, approximately, was expended in installing the new air-compressor at Shady Bend?

A. Installing the new air-compressor—do you mean just the installation of the air-compressor?

A. I mean the building, the installation of it and everything that is necessary to make it complete?

A. Approximately \$30,000.00; I can tell you exactly from my books; that is moving the machinery, and installing the pipe-lines and putting in foundations, and so forth—the general work of the installation of the plant.

Q. Do you remember approximately the time that this air-compressor was moved from Juneau up there and the installation of it commenced?

A. We started moving the machinery from the dock on the 27th of May, I think, Judge.

Q. What year? A. 1913.

Q. Now, up to that date you had been connected with the officers of that company both here and in the east, had you not, Mr. Noble? A. Yes, sir.

Q. I will ask you if you found out about the title and the number of suits that were commenced or threatened when you were here in 1912?

A. I did.

Q. And you found out some parts of the property were in controversy between the Ebner Company and the Alaska-Juneau Company, did you, Mr.

(Testimony of George R. Noble.)

Noble. A. I did. [1155—1005]

Q. Did you report all these matters when you went back east? A. I did.

Q. I will ask you whether or not these matters aided you in raising money, or were an obstacle in the way of raising money?

A. They were an obstacle—a decided obstacle.

Q. Before you came out here on that trip, I believe you stated you had heard about these suits?

A. Yes, sir.

Q. Was that any part of your investigation—that is, any part of the matters you were instructed to investigate? A. It was.

Q. I will ask you, Mr. Noble, to state some instance in which you were confronted with the condition of the title, and as to whether or not on such occasions these suits and the condition of the title were brought up and discussed; and, if so, what effect it had upon your being able to obtain any money?

A. At that time, or at practically all of the times since we have been raising money for this project, we have been confronted by all of our prospective purchasers with the question of title, or of lawsuits that were pending in Juneau with relation to water rights, and with relation to patented claims, which have been brought to our attention most forcibly; I remember a large banking house, Barauch Brothers, with whom I was in direct communication, and then another Harley Larned of New York—in all instances it has been largely discussed there, particularly through banking circles.

(Testimony of George R. Noble.)

Q. Did it in anywise interfere with your obtaining money to carry these things on?

A. It certainly has interfered with the obtaining of money. [1156—1006]

Judge WINN.—I think that is all.

Mr. HELLENTHAL.—No questions.

(WITNESS EXCUSED.)

(Whereupon an adjournment was taken until 2 o'clock P. M.)

AFTERNOON SESSION.

August 6th, 1914, 2 P. M.

The defendant, to further maintain the issues on its part, recalled as a witness GEORGE R. NOBLE, who, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Judge WINN.)

Q. Mr. Noble, this morning, I believe, you stated that the funds for installing the air-compressor where it is at present installed on the Cape Horn No. 2 lode claim was procured by you—that is, you paid out the money for that? A. I did.

Q. Now, I will ask you, Mr. Noble, if you know what time you got the pipe-line from the penstock connected up with the new air-compressor?

A. The 8th day of August was the last work we done on the pipe-line, and the water was turned in on the 10th day of August, 1913. [1157—1007]

Q. And applied to the new air-compressor?

A. Yes, sir.

(Testimony of George R. Noble.)

Q. Do you know what time, with respect to that date, that the Alaska-Juneau Company put its water down through its flume line down to its mill site here on the beach?

A. I think it was several days later.

Judge WINN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Where did you get that idea, Mr. Noble?

A. Where did I get the idea?

Q. Yes. A. From observation.

Q. You remember a lawsuit between the Alaska-Juneau Company and the Worthen Lumber Company about that water, don't you?

A. I don't know that I have ever heard of such a suit.

Q. You have heard of such a suit—that suit was brought before that, wasn't it?

A. I don't know, sir.

Q. You don't know that the Alaska-Juneau Company had been using the water on the mill site long before August—that is, when I say long before, I mean a couple of months before, in ground sluicing and sluicing off the mill site? A. I don't know.

Q. You would not say that it is not a fact, would you?

A. I wouldn't say that it is a fact; I said I thought it was several days later, and you asked me where I got that information and I said from observation—that is my impression; I am not making a positive statement.

(Testimony of George R. Noble.)

Q. You wouldn't say that prior to that time the Alaska-Juneau [1158—1008] Company had not already had a series of litigation with the Worthen Lumber Company started because we were using that water on that hillside?

A. I won't, because I don't know.

Q. You are not willing to say that the Alaska-Juneau Company had not been using that water for a considerable time before August 10th, will you?

A. I am willing to say this, that as far as my observation went in the use of that water on the mill site by the Alaska-Juneau Company prior to the time we turned it into our air-compressor, that it had not been put to a commercial use in doing anything on that mill site. Now, you might have had the water running down from the mill, as you did for sometime; from natural observation it was running down over the hill, but was not accomplishing anything—any commercial purpose.

Q. You know from natural observation that it was running down from that hill before August 10, 1910?

A. I don't know the date that you turned the water on the hill down there.

Q. Do you know anything about the process of ground sluicing?

A. I think I know something of it; yes.

Q. Where did you have experience in ground sluicing? A. Here.

Q. Where? A. Salmon Creek.

Q. That is the only experience you have had?

A. I have seen other ground sluicing.

(Testimony of George R. Noble.)

Q. Ground sluicing—that is one operation to be carried on in connection with mining, isn't it?

A. I understand so. [1159—1009]

Q. You don't want to testify now that the Alaska-Juneau Company had not used this water in connection with ground sluicing on the hillside before August 1st, 1913, do you?

A. To the best of my knowledge I believe they had not applied that water to a good use or practical use in ground sluicing.

Q. You are not willing to testify, however, that they did not?

A. I stated to the best of my knowledge I believe it was not applied to ground sluicing as ground sluicing is generally done.

Q. But while you are willing to say to the best of your knowledge, you are not willing to make a positive statement that that water was not put to use prior to August 1st, 1913, are you?

A. I didn't make any positive statement; I answered the question just as I have answered it before.

Q. You are not willing to make that positive statement—is that correct, now?

A. I have answered your question, sir.

Q. My question, Mr. Noble, is this—you may have answered it, but I want the record to show clearly what you mean—while you are willing to say that to the best of your belief the water was not put to use prior to August, 1913, by the Alaska-Juneau Company, you don't testify positively that it was not put

(Testimony of George R. Noble.)

to use prior to that time—is that your testimony?

A. To the best of my knowledge I believe it was not put to use in the methods used in ground sluicing—in the proper method of ground sluicing, or to any practical use prior to that time.

(Question re-read.)

A. I answered the question.

Q. I insist that you answer the question. [1160—1010]

(Question re-read.)

A. That is my testimony.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Judge WINN.)

Q. Now, I will ask you, Mr. Noble, if that water was running down over the hillside out of the flume of the plaintiff company prior to August 10th—just state to the Court in what manner it was running down the hillside—was it being used by giants or was it being used through any flume; or was it just flowing out of their flume line?

A. To the best of my knowledge it was running down over the hill in one big stream—an overflow through their flume line.

Q. (By Mr. HELLENTHAL.) But it had been running down over the hill that you observed for some time prior to August, 1913, had it not?

A. I couldn't state definitely on that.

Q. You cannot state definitely on that?

A. I cannot fix that exact date.

(Testimony of John Perelli.)

Mr. HELLENTHAL.—That is all.

Judge Winn.—That is all.

(WITNESS EXCUSED.) [1161—1011]

The defendant, to further maintain the issues on its part to be maintained, introduced as a witness JOHN PERELLI, who, being then duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of John Perelli, for Defendant.

Direct Examination.

(By Judge WINN.)

Q. Mr. Perelli, did you have anything to do with working around and installing the air-compressor of the Ebner Company up at Shady Bend, in July or August of last year? A. Yes, sir.

Q. What was your work?

A. I was in charge of the work as foreman.

Q. I will ask you if you remember the date that you connected up the penstock with that air-compressor by the pipe that goes down the hill?

A. That was completed on the 8th day of August, 1913.

Q. When did you apply the water to that new air-compressor up there?

A. Turned the water in on the 10th day of August.

Q. Now, I will ask you if prior to that time, or about that time, you were downtown and observed anything about the flume line of the Alaska-Juneau Company in and about where its mill is now?

A. Yes, sir.

(Testimony of John Perelli.)

Q. What, if anything, was being done with the water there?

A. The water simply was running down the hill.

Q. Running down the hill? A. Yes, sir.

Q. Do you know when Mr. Jones got his first giant and put it to work there?

A. I don't recollect the day; sometime the last part of August. [1162—1012] He asked me where he could get a giant to use it on there, to use striping and washing it off, and I told him to see Harry Bishop, he had one.

Q. That was some time in the last part of August?

A. Last part of August; yes, sir.

Q. Do you remember the first time that you saw that giant put to work down about where the Alaska-Juneau's mill is now?

A. Way late in August when I saw it down there.

Q. You have been mining for some length of time, haven't you—that is your business?

A. Yes; I have been mining the last thirty-five years—that is my business.

Q. Placer mining?

A. Yes; placer mining and quartz mining.

Q. I will ask you how that water up to and prior to the 10th day of August, was running down from the flume of the Alaska-Juneau Company?

A. Just run from the flume down the hill; and when the water runs down there once it gets clear to bedrock and it don't do any good for ground-sluicing.

Q. After it gets down to bedrock it will just keep running in that one channel? A. That is all.

(Testimony of John Perelli.)

Q. Is that the way you saw this water doing?

A. Yes, sir.

Judge WINN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. When was it that you saw this water running downhill—before you turned the water to your air-compressor?

A. I don't know what date; the water has been running for a long time around that flume there.

[1163—1013]

Q. Were you there every day?

A. Yes, sir; I was there every day.

Q. For how long a time were you up to the Alaska-Juneau mill site every day? A. Every evening.

Q. After work? A. Yes, sir.

Q. After work you went up there?

A. After work; yes, sir.

Q. After work? A. After my work.

Q. When was that? A. After six.

Q. And after six in the evening you saw the water running down the hill? A. Yes, sir.

Q. You don't know whether they were ground sluicing with that water all day in the daytime, or not, do you? A. They had men working there.

Q. They had men working there? A. Yes, sir.

Q. Clearing off the mill site?

A. But the water was running right straight down the bedrock.

Q. There were men working clearing off the hillside—is that right—and they were using that water

(Testimony of John Perelli.)

to clear the hillside off?

A. I don't know whether they were clearing the hillside off with water, but the water was running down in bedrock.

Q. That was after six o'clock in the evening?

A. Yes.

Mr. HELLENTHAL.—That's all.

Judge WINN.—Was it runing down in one channel or in different channels? [1164—1014]

A. One channel is all I see it.

Judge WINN.—That's all.

(WITNESS EXCUSED.)

Judge WINN.—With the exception of a location notice of the Cape Horn No. 2 mill site, signed by Mr. Ebner, of which we desire to get a certified copy and offer in evidence, and a deed from a man named Martin to the Ebner Gold Mining Company, that is our case.

DEFENDANT RESTS. [1165—1015]

CHARLES WELLS, a witness called in rebuttal on behalf of the plaintiff, having been recalled for further cross-examination, and having been previously sworn, testified as follows:

Testimony of Charles Wells, for Plaintiff (Recalled in Rebuttal).

Cross-examination.

(By Judge WINN.)

Q. Charley, while you were on the witness-stand I think Mr. Hellenthal was questioning you concerning the records of an organization which used to be here of the miners in the Harris Mining District—

(Testimony of Charles Wells.)

you remember seeing this minute-book of the Harris Mining District from August, 1881, to February, 1888, do you?

A. I think that is the one Mr. Hellenthal showed me.

Q. Now, I will ask you, Charley, if you were ever present at a meeting of the miners in the Harris Mining District—at an annual meeting on February 12, 1887, to elect a District Recorder for the Harris Mining District for the ensuing year?

A. I was not.

Q. Now, did you ever examine this record-book, Charley? A. I never did.

Q. Never did examine that at all? A. No.

Q. Now, I will ask you to look at page 91 of this book, and I ask you if you know anything about it?

A. Better read that yourself.

Q. “The regular annual meeting of the Miners of Harris Mining District was held on February 12, 1887, to elect a District Recorder for Harris Mining District for the ensuing year. D. H. Murphy, Esq., was chosen Chairman and John G. Heid, Sec’y. There being no opposing candidates for said office of District Recorder; upon motion of S. Lewis the rules were suspended and Louis L. Williams, the present incumbent, was chosen the Recorder by acclamation. On motion the meeting adjourned [1166—1016] *sine die*. J. G. Heid, Secretary.”

A. I wasn’t at that meeting.

Q. You were not at that meeting? A. No, sir.

Q. Did you ever hear of any such resolution or

(Testimony of Charles Wells.)

election taking place? A. I don't think I did.

Q. You said something about Louis L. Williams being United States Commissioner here at some time, didn't you, Charley?

A. He was at one time; yes.

Q. Was he United States Commissioner in 1887?

A. That I cannot say, Judge; it is pretty hard to remember back that many years.

Q. Don't you know, Charley, that it was under that resolution that I have just read to you that the books of the Harris Mining District were turned over to Louis L. Williams, and he was United States Commissioner at that time? A. In 1887?

Q. Yes. A. I don't.

Q. You never heard of that?

A. Not at that meeting that the recorder's books were turned over to the Commissioner.

Q. Do you know whether or not Louis L. Williams was recorder of the Harris Mining District from the year 1887 to 1888?

A. No, sir; I couldn't positively say.

Q. What time, then, Charley, in your direct examination were you directing your testimony to?

A. 1888.

Q. Now, then, how do you contend that the books were turned over to Louis L. Williams in 1888?

A. I didn't say they were turned over to Louis L. Williams; they were turned over to the Commissioner. [1167—1017]

Q. Wasn't he Commissioner then?

A. Oh, I guess he was; I don't know; he might

(Testimony of Charles Wells.)

have been; I would not say positively.

Q. To whom were the books turned in 1888?

A. To the Commissioner.

Q. If they were turned over to Louis L. Williams, then he was Commissioner at that time, was he?

A. I won't say they were turned over to Louis L. Williams; I say they were turned over to the Commissioner; if he was Commissioner at that time, yes.

Q. Here is a resolution that is found on page 92 of this book: "The regular annual meeting of the Miners of Harris Mining District, Alaska, was held, pursuant to the regular call, at the Court house in the town of Juneau, Alaska, on the 11th day of February, 1888. Upon motion, J. G. Heid was chosen Chairman and John Olds, Secretary. Upon motion of John Curry, Esq., the rules were suspended and L. L. Williams, the present incumbent of the office of Recorder for said Harris Mining District, was elected by acclamation, for the ensuing year, as Recorder for said Harris Mining District, Alaska. Dated Feby. 11, 1888. John Olds, Secretary. John G. Heid, Chairman." Do you remember of being at a meeting when such a resolution was passed? A. In 1888?

Q. Yes, sir; 1888, February.

A. Yes, sir; I was at that meeting; I cannot tell you the date or the day of the month.

Q. That is the way the books were turned over to L. L. Williams—was under that resolution?

A. I didn't say L. L. Williams; they were turned over to the Commissioner; I don't know if he was Commissioner or not at the time. [1168—1018]

(Testimony of Charles Wells.)

Q. Do you remember any such resolution ever having been passed?

A. I remember the resolution because we wanted to do away with two recorders.

Q. Were you present at that meeting?

A. I was present at that meeting in 1888.

Q. When this resolution I have just read to you was passed?

A. I don't know about L. L. Williams; I won't say that that was mentioned in the meeting at all; I will say they were turned over to the Commissioner.

Q. Charley, if this resolution appears in this minute-book, at page 92, you don't deny that the resolution was passed, do you?

A. May I ask one question, Judge? How many miners' meetings have been held in Alaska, here in Juneau?

Q. Answer my question—I am not testifying. Were you present, Charley, when that resolution was passed?

A. I was present at the time in 1888 that the books were turned over to the Commissioner.

Q. And you don't remember who the Commissioner was?

A. No, sir; I don't, because I took no interest in it; it didn't make any difference to me who it was.

Q. Don't you know they were turned over to him by reason of the passage of this resolution?

A. To who?

Q. To the man mentioned.

A. The Commissioner—yes, they were turned over

(Testimony of Charles Wells.)

to the Commissioner.

Q. That is what you want the Court to understand; this was your testimony when Mr. Hellenthal was questioning you—that there was a resolution passed and the books were turned over to the Commissioner, and you don't know whether it was L. L. Williams or not? [1169—1019] A. I don't know who it was.

Q. Charley, you know that this meeting that I just referred you to, which took place at Juneau, Alaska, February 11, 1888, was the last Recorder that was ever elected for the organization of the miners, don't you?

A. I am aware of the fact that we had no local recorder.

Q. There never was any meeting held in the Harris Mining District after this meeting was held in February, 1888, was there? A. Not that I know of.

Judge WINN.—Now, if your Honor please, I offer in evidence these two pages, 91 and 92 of the minute-books of the Harris Mining District, August, 1881, to February, 1888, as part of the witness' cross-examination.

(Whereupon said pages were received in evidence and marked Defendant's Exhibit "J-2.")

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Wells, the meeting that you have testified to as having been held in 1888, was that the meeting held in February, or a meeting held in the latter end of the year?

A. I don't know what end of the year it was held

(Testimony of Charles Wells.)

in. I will tell you why I understand it to be in 1888. In 1887 I was called from here to San Francisco; I was making a sale of what they call the Ebner mine. I was down there until the latter part of February, 1888, and I got to Seattle and had to go back to San Francisco again, and when I got to San Francisco I got a dispatch to come on up immediately; I come up and got my man, and they paid me my money for the property, \$60,000, and that is why I know it.

Q. When did you come to Juneau, Mr. Wells, in the year 1888 from San Francisco?

A. It was along in March—the fore part of March or latter part [1170—1020] of February.

Q. If this meeting was held on the 16th of February, was this the meeting you attended?

A. The meeting was held between the time I came here and the time I went to Seattle in the fall of '88.

Q. The date on which this meeting was held, concerning which Judge Winn has cross-examined you, and the one Judge Winn asked you if you were present at, is dated in the book as February 11, 1888—were you here then?

A. No; I wasn't here; I was probably here about the last of February or March first.

Q. If this meeting was held on February 11, 1888, having called your attention to that date, then is the meeting reported in this book the meeting to which you have testified?

(Not answered because of objection.)

Q. Let me ask you this question—when was the

(Testimony of Charles Wells.)

meeting held, Mr. Wells, that you attended in the year 1888?

A. I couldn't exactly tell you that either; there was several places here they held the Court; there wasn't no regular courthouse.

Q. What I am trying to get at, Mr. Wells, is between what dates was it held? A. In 1888?

Q. Yes. A. Well, I left here in December.

Q. You left here in December and came here when?

A. I come here the first of March or the latter part of February.

Q. And the meeting concerning which you have testified was held between those two dates?

A. Between the time I come here and when I left in the fall, or December.

Q. You cannot place it any more definitely?

A. That is all. [1171—1021]

Q. That is as near as you can say?

A. That is as near as I can say because I never thought I would be called up for anything of this kind, and I ain't kept any account of it.

Q. That meeting was called for the purpose of doing away with the two recorders? A. Yes.

Q. And it was decided there then that from then on the Commissioner should also be the Recorder?

A. Yes, sir.

Mr. HELLENTHAL.—That is all.

Recross-examination.

(By Judge WINN.)

Q. Charley, how is it that you remember that the miners had another meeting here after February,

(Testimony of Charles Wells.)

1888,—how is it you remember that?

A. After February 11th?

Q. Yes, sir.

A. Because it happened at the time I was here, then I went to Seattle in the fall.

Q. How do you remember the date so well that you went to Seattle and came back?

A. I remember the date because I had to; I had business.

Q. What date did you leave here to go to Seattle?

A. I couldn't tell you the date within a week, or probably six weeks; but I know that I left in December and got there before the first of the New Year.

Q. What time in December?

A. I cannot tell you.

Q. Did it take you all the time from December until New Year to go to Seattle?

A. Well, them days, Judge, it took a boat about two weeks to make [1172—1022] the trip down—not coming back, only one way.

Q. Did you arrive in Seattle on January first?

A. I couldn't say.

Q. On New Year's day, or what day?

A. It might be on December 25th or December 29th, for all I know, because I know when I got there I had 18 days in Seattle.

Q. What is the nearest date you can give, Charley, that you arrived in Seattle?

A. Any time probably from the first of December to the first of January; I know I got there inside of a month.

(Testimony of Charles Wells.)

Q. That was in 1888? A. Yes, sir.

Q. How long did you stay there, Charley?

A. In Seattle?

Q. Yes.

A. Oh, I stopped there for February, March and April—stopped there in the neighborhood of three or four months.

Q. In 1889? A. Yes.

Q. Where were you in February, 1888?

A. I was here in Alaska—in 1888?

Q. Yes, sir.

A. No, I wasn't; you are trying to get me mixed up a little and knock me off my pins—1888, February, 1888?

Q. Yes, sir. A. I was in Seattle.

Q. Well, then, you left here in 1887 to go to Seattle instead of 1888, is that it?

A. I didn't leave here in 1887 to go to Seattle; I left here in 1887 to go to San Francisco and come back in 1888.

Q. What time did you come back in '88?

A. I got back about the fore part of March or the latter part of February. [1173—1023]

Q. How do you know that date?

A. Well, any man will know when \$60,000 happened to be put in his pocket—he ought to know it.

Q. Is that the way you arrive at the date you arrived in Juneau?

A. That is what makes me think of it.

Q. Charley, will you swear positively that you were not here in Juneau on the 11th day of February,

(Testimony of Charles Wells.)

1888? A. Yes; I will swear positively I wasn't.

Q. What is the earliest date in February that you will say you were in Juneau that year?

A. In February?

Q. Yes, sir.

A. I didn't say that I come in February; I said I might have come here the latter part of February or the first of March.

Q. Is that the nearest you can place the date you got back here?

A. Yes, because I had to come back.

Q. For what?

A. Telegraphed to come back and take those men up to look at the property.

Q. You got a telegram there in Seattle to come back to Juneau?

A. Not while I was in Seattle; I left Seattle and went to San Francisco, and when I got to San Francisco I got a telegram to come back here—

Q. Who came up with you?

A. Van Brocklin and Jack Summers, who died last summer—or winter in White Pass.

Q. You swear that after you got back here that they held another miners' meeting?

A. Between that time that I got here and the time I left there was another meeting.

Q. When did you leave?

A. Sometime in December, for Seattle.

Q. In 1887 or '88? [1174—1024]

A. In '88; in '87 I was in San Francisco.

Q. Then, this resolution that was passed on Febru-

(Testimony of Charles Wells.)

ary 11th— A. I know nothing at all about it.

Q. You know nothing about it?

A. No, sir; I don't know a thing about it.

Q. What was the necessity, Charley, of calling a meeting when they had already held a meeting on February 11, 1888, and had elected Williams as the recorder for a year, which would take it up to 1889—what was the necessity of holding another meeting then?

A. There was a great many meetings here—there was no necessity of calling it at all.

Q. Do you know what they called any such meeting for at that time?

A. I don't know; I never took any interest in that kind of a meeting; in other meetings I have, but not in this meeting here because there were plenty of other people here to attend to it.

Q. Who got up and made any motion at that meeting, Charley?

A. You can't prove it by me; I didn't have interest enough to pay any attention to it.

Q. Who presided at that meeting?

A. I couldn't tell you.

Q. What was done at that meeting?

A. I don't know, only they turned the books over to the Commissioner.

Q. Don't you know they had already been turned over to Louis Williams in 1887?

A. Not that I know of; I wasn't here in '87.

Q. Who was it first put this thing on foot in that meeting, about the motion to turn them over to the

(Testimony of Charles Wells.)

Commissioner? A. I couldn't tell you.

Q. How did the motion read?

A. I don't recollect now. [1175—1025]

Q. How old are you, Charley?

A. Sixty-seven; I am old enough to have sense enough to know what happened.

Q. Is your memory good?

A. Yes, just as good as usual, and a little better in some things.

Q. Why is it, Charley, if you were at that meeting when the resolution was passed that you don't remember who got up and made it, or anything

A. Didn't take interest enough in it; I was through with my interest and thought I was going to get out of the country altogether; that is why I didn't pay more particular attention to it.

Judge WINN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Wells, in answer to Judge Winn's question you stated that the action taken was to turn the books over to the Commissioner? A. Yes, sir.

Q. What I want to get at now—that was the only action you remember, and you said that was the only action you remember was taken?

A. That is it; that is all I paid any attention to.

Q. What I am trying to get at, in order to straighten out any confusion in the record—previous to this time you have testified that the records were turned over to the Commissioner and action was taken making the Commissioner the recorder of the

(Testimony of Charles Wells.)

Harris Mining District for future years?

A. Yes, sir.

Q. Do you mean to incorporate that in your answer? A. Yes, sir.

Mr. HELLENTHAL.—That is all.

(WITNESS EXCUSED.) [1176—1026]

The plaintiff, to further maintain the issues upon its part, introduced as a witness in rebuttal PETER EARLY, who, being then duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of Peter Early, for Plaintiff (In Rebuttal).

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is Peter Early? A. Yes, sir.

Q. What is your business?

A. I have been prospecting—prospector.

Q. Mining? A. Mining.

Q. How long have you been engaged in that business? A. Well, about 19 years in Alaska.

Q. Do you know where the Harris Mining District is? A. Yes, sir.

Q. How long have you lived in the Harris Mining District?

A. Well, I have lived in the Harris Mining District ever since I have been in Alaska excepting what time I have been out prospecting on my property.

Q. Your home has been in the Harris Mining District for nineteen years? A. Yes, sir.

(Testimony of Peter Early.)

Q. That is the 19 years last past? A. Yes, sir.

Q. Mr. Early, directing your attention now to the rules of the miners of the Harris Mining District—when you came here to the Harris Mining District did you find it an organized mining district at that time? A. Yes.

Q. Now, directing your attention to the rules of the miners of the [1177—1027] Harris Mining District as they have been read in evidence here relating to the appropriation of water and the acquisition of water rights—you are familiar in a general way with those rules?

A. Yes; I am familiar with them.

Q. Those rules, Mr. Early, as they are enforced by the miners, how do those compare with the rules as contained in the records of the Harris Mining District offered in evidence here and read into the record?

A. They are the same as the rules that were in force when I came to the country. I came over to Judge Mellen and—

Q. Who was Judge Mellen?

A. He was the recorder.

Q. Did you make any inquiries at that time as to what the rules were? A. Yes, sir.

Q. From whom? A. Judge Mellen.

Q. He was the recorder in whose custody the rules were kept? A. Yes, sir.

Q. Now, Mr. Early, do you know whether those rules as read in evidence and as you found them to be in force when you came here have been since that

(Testimony of Peter Early.)

time, and are at the present time generally observed by the miners of the Harris Mining District?

A. Well, yes; I know myself and from talking with others that the rules—

Q. Have those rules concerning which you have testified of the Harris Mining District relating to the appropriation of water and the acquisition of water rights, to which we have just referred, been generally observed by the miners of the Harris Mining District from the time that you came here up to the present time? [1178—1028]. A. Yes.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. Are you in the employ, Mr. Early, of the Alaska-Juneau Gold Mining Company? A. No, sir.

Q. You have been in their employ recently, haven't you? A. No, sir; not recently.

Q. What are you doing now?

A. I ain't doing anything.

Q. How long ago was it that you quit the service of the Alaska-Juneau Gold Mining Company?

A. Last year.

Q. Last year? A. Yes, sir.

Q. How many water locations, Mr. Early, have you made in Alaska?

A. I have made, I think, about four—four or five; made four myself and had one made.

Q. When was the first one you made?

A. It was on Kowee Creek, in the Berner Bay country.

(Testimony of Peter Early.)

Q. That was in the Berner Bay Mining District and not in the Harris Mining District?

A. Yes, sir.

Q. You followed the Harris Mining District rules in making that location, did you?

A. That was my intention.

Q. Do you know where you recorded that notice?

A. I think it is recorded here.

Q. Did you give the year?

A. Yes, sir; I think it was in 1898, the first location I made.

Q. Located in your own name? [1179—1029]

A. Located it in my own name.

Q. Did you make it in your own name?

A. I think I did, yes.

Q. Signed it yourself? A. Signed it myself.

Q. Do you know substantially what you put in that notice? A. Well, no; I don't remember.

Q. Do you know what the rules of the Harris Mining District require you to put in a notice?

A. Well, I have a copy and also had one of those books. I made it as near that as I could make it out, I think.

Q. Do you remember now, Mr. Early, what the rules of the Harris Mining District, pertaining to water locations, require of you to put in a notice?

A. Well, yes; in a way I do.

Q. What do they require?

A. Well, in the first place you have to mention the number of inches that you think you will require, and post that notice on the claim or place where

(Testimony of Peter Early.)

you calculate to appropriate it, and the instructions are to record it in ten days, and commence work on it in twenty days, I think, or within that time.

Q. Now, did you contain those matters in that notice that you posted out at Berner's Bay, the first one you say you posted in Alaska?

A. I think I did.

Q. Would you be sure of it.

A. Well, it is my idea that I did.

Q. Did you record that notice within ten days after you posted it on the place of intended diversion?

A. I would't be sure as to that, whether I did or not, but as soon as I could come to town I think I filed the notice on record.

Q. You will not say whether you got it on record within the ten days or not? [1180—1030].

A. No, I wouldn't; it was my intention; I commenced work on it immediately.

Q. Was that 1898 or 1900 that you made this location? I ask you because I want to look up the record.

A. It was right close there; I wouldn't say it was '98; I ain't positive as to the year.

Q. Do you remember how many inches of water you claimed under that notice? A. No, I don't.

Q. Do you remember under what pressure you said you would take it from the creek?

A. I don't believe I remember that.

Q. You don't think you put that in the notice, do you? A. No; I put in the quantity at the time.

Q. This was what creek? A. Kowee.

(Testimony of Peter Early.)

Q. Now, let me refresh your memory on that notice, Mr. Early: Don't you know that you were eight days behind the ten days in having it filed for record?

A. I might have been; I didn't say that I had it filed within the ten days.

Q. I know you didn't; you said you didn't know; I just simply want to ask you if you don't remember you were eight days after the ten days in filing that location. Did you file any other location about that time?

A. I think I filed a power site or a mill site.

Q. On the same creek? A. Yes, sir.

Q. Are you sure that that other notice was a power site or water location notice—didn't you make two water locations about that time?

A. I made two at the same time; I am under the impression that one was a power site and the other a water location. I know [1181—1031] I only worked on the water location at that time.

Q. Well, now, do you remember, to refresh your memory, that in both of those notices, in one you claimed 1,000 miner's inches, and the other 5,000, and they were both water locations?

A. They might have been.

Q. Do you remember that you didn't file or have recorded either one of those notices within the ten days? A. I don't hardly think I did.

Q. What is your next water location notice, Mr. Early? A. I think in 1903.

Q. Where did you make that one?

(Testimony of Peter Early.)

A. Over there on the creek in the Yankee Basin country.

Q. Do you remember how many inches of water you located there?

A. No, I don't; I couldn't say without looking the notice up.

Q. You know you didn't get that on the record in time, don't you, Mr. Early?

A. I think I turned that over to Mr. Heid to get right in.

Q. Mr. John G. Heid? A. Yes, sir.

Q. You don't know, then, whether it was recorded within the ten days or not, do you? A. I do not.

Q. That was made what time?

A. I think it was in 1905.

Q. On what creek? A. Kowee.

Q. The same creek. Was that made in your own name?

A. I was one of the parties to the location, and I think also Mr. Heid's name was on that location.

Q. John G. Heid? A. John G. Heid.

Q. I just want your best remembrance, Mr. Early, so I can ascertain from the records—you wouldn't be positive whether [1182—1032] Heid's name was on it or not, would you?

A. No, I wouldn't, but I know he was interested at that time.

Q. Was there a man by the name of Bach?

A. Frank Bach; yes, sir.

Q. Heid, Bach and you?

A. I think that is what it had on the notice.

(Testimony of Peter Early.)

Q. Don't you know, Mr. Early, that that notice was recorded at least a month after the ten days had expired?

A. I couldn't say as to that because I turned the notice over to Mr. Heid.

Q. I will change that to pretty nearly three months after. A. I don't know.

Q. If the records show that, you have no reason to doubt it, have you? A. Certainly not.

Q. Now, where was your next water location, Mr. Early?

A. That was on,—I didn't make that location; it was made under my direction; I didn't make it myself.

Q. Where was that?

A. That is on Canyon Creek, I think.

Q. When was that made, and in whose name?

A. That was last spring a year ago; it was made in Gudmund Jensen's name.

Q. And on Canyon Creek? A. Yes.

Q. Where is Canyon Creek?

A. It is up in Yankee Basin, in Berner's Bay; and another one, I think, on the northeast fork of Kowee Creek; I think those are the only locations I have ever been interested in.

Q. In whose name, did you say?

A. Gudmund Jensen's.

Q. Did you sign and draw up the notice, or did he do that, Mr. Early? [1183—1033]

A. I don't remember that.

Q. You don't know anything about the recording

(Testimony of Peter Early.)

of that notice, do you?

A. Yes; I think that was recorded within the ten days; I tried to follow out—it was my instructions to him to follow the rules, and I think he recorded that in time.

Q. These were all out of the Harris Mining District, weren't they? A. Yes.

Q. None of them in the Harris Mining District?

A. None of them in the Harris Mining District.

Q. Now, where did you make a water location in the Harris Mining District?

A. That is the only locations I have ever made.

Q. You answered Mr. Hellenthal's question that you knew the boundaries of the Harris Mining District? A. When I came here—

Q. Now, wait; Mr. Hellenthal asked you if you knew where the boundaries—where the Harris Mining District is, and I think you answered that question that you did. Now, do you contend that this part of the country you have been making locations in is the Harris Mining District? A. I do not, no.

Q. You never have made a location of water in the Harris Mining District, have you?

A. I have not.

Q. Well, if three of these notices were not filed within the time, and one was filed within the ten days, you didn't even adhere to the rule yourself, or attempt to, did you, Mr. Early?

A. I did, as closely as I could do it.

Q. Well, you know that that has been the general rule so far as recording is concerned, that they put

(Testimony of Peter Early.)

them on record as soon as they can, or within a reasonable time, don't you? A. Yes, sir. [1184—1034]

Q. You know that particular or specified time of ten days hasn't been followed in only a few cases, don't you? A. No, I don't know that.

Q. Well, how many cases can you mention to the Court that anyone has posted up a water location notice, of your own knowledge, and filed it within the ten days?

A. Personally I couldn't say of a single one.

The COURT.—When you came to the Harris Mining District I understand you to say that the rules as read into the record were the rules that were then in force here?

A. That is what I understood; that is my information.

The COURT.—As to the location of water?

A. Yes, sir.

The COURT.—Now, as to the location of mining claims, what rules were in force?

A. Well, I think the instructions I got and the way we have always located, we had thirty days to record and ninety days to establish our lines permanently

The COURT.—No, I mean what rules were in force as compared to the rules that were in the pamphlet that you say you had, as to the location of mining claims?

A. Well, I don't know of any other rule; I followed the same rule all the way through.

The COURT.—Did you locate any mining claims

(Testimony of Peter Early.)

in the Harris Mining District?

A. I did locate one, but I found out that I was on ground that was claimed, and I didn't have it put on record.

The COURT.—Now, the mining rules that the discoverer of a claim shall have 200 feet extra, was there any such rule as that in force when you came here?

A. Not in force; no, sir.

Q. There was another rule in that pamphlet that you referred to, providing hill claims, gulch claims and creek claims—do you know of any such subdivision of claims? [1185—1035]

A. I have never located a placer claim in the country.

The COURT.—Do you know whether that rule was in force?

A. Well, it was my understanding in talking to the miners that that was the rule; there was some such rule.

The COURT.—Now, when you go out to locate claims in the Harris Mining District, would you locate, say, Discovery, claim No. 1 above Discovery; claim No. 2 above Discovery; claim No. 3 below Discovery, and so forth, or how were the claims named?

A. I couldn't answer that question because I never had anything to do with placer.

The COURT.—You don't know what the rule was about that? A. No; not in particular.

The COURT.—Did anybody ever call your attention to the fact that the rules for locating mining claims were not applicable, but that the rules for

(Testimony of Peter Early.)

locating water were still in force?

A. That has always been my understanding.

The COURT.—That the rules as to mining claims were not in force, and the rules as to water claims were in force?

A. No; the rules and the law are what we always went by.

The COURT.—What I am trying to get at Mr. Early—did you, or did you not, understand that the rules for locating mining claims which are contained in that little pamphlet, and the rules for making locations of water were all in force at that time?

A. Yes, sir.

The COURT.—That was your understanding?

A. Yes, sir.

The COURT.—That is all.

Judge WINN.—That is all.

(WITNESS EXCUSED.) [1186—1036]

The plaintiff, to further maintain the issues on its part to be maintained, introduced as a witness, in rebuttal, AL WILSON, who, then being duly sworn to tell the truth, the whole truth and nothing but the truth, testified in rebuttal as follows:

**Testimony of Al Wilson, for Plaintiff (In
Rebuttal).**

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is Al Wilson? A. Yes, sir.

Q. You know where the Harris Mining District is, do you? A. Yes, sir; pretty close to it.

(Testimony of Al Wilson.)

Q. What is your occupation, Mr. Wilson?

A. Prospecting and working around the mines.

Q. When did you come to the territory embraced in the Harris Mining District? A. 1886.

Q. 1886? A. Yes, sir.

Q. And you have lived here most of the time ever since?

A. Yes; I have been inside a couple of times; only below once.

Q. But your home has been here?

A. Right here in Juneau.

Q. When you came here in 1886 had the Harris Mining District been organized? A. Yes, sir.

Q. At that time did they have rules in the Harris Mining District relating to the appropriation of water and the acquisition of water rights?

A. Yes, as far as I could find out they did.

Q. The rules as read here from the minutes of the records of the Harris Mining District, how do they compare with the rules of the miners that you found in force at the time you came here? [1187—1037]

A. Yes, sir; they were; the rules that I heard are the same.

Q. Those are the rules?

A. No, sir; there was no other rules.

Q. Do you know whether, Mr. Wilson, the rules that were read into the record and which you say were in force at the time you came here, have been generally observed by the miners of the Harris Mining District between the time you came here in 1886 up to the present time?

(Testimony of Al Wilson.)

A. Yes, sir; as near as I know.

Q. Now, I will ask you if those rules as read into the record relating to the appropriation of water and the acquisition of water rights have been generally observed by the miners of the Harris Mining District during the period commencing with 1886 to the present time?

(Question not answered because of objection.)

Q. What do you say, Mr. Wilson, as to whether the rules as read into the record as the rules of the Harris Mining District concerning the appropriation of water, have been generally observed by the miners during the time to which you have testified—that is to say, the period commencing with 1886 up to the present time?

(Not answered because of objection.)

Q. What do you say, Mr. Wilson, as to whether or not those rules that have been read into the record from the minutes of the Harris Mining District, concerning which you have testified, have been generally observed by the miners of the Harris Mining District during the period commencing with 1886 up to the present time? A. Yes; as well as I know they have.

Q. As well as you know they have been what—been observed? A. Yes, sir; been observed.

Mr. HELLENTHAL.—You may cross-examine.
[1188—1038]

Cross-examination.

(By Judge WINN.)

Q. What are the rules, Mr. Wilson?

A. In what way do you mean?

(Testimony of Al Wilson.)

A. Just give me the rules. A. In order?

Q. Yes, sir.

A. Well, you have got to record in ten days, and get to work in twenty days.

Q. What have you got to put in your water location notice?

A. Well, you have got to put in where you have it at and where you are going to use the water at.

Q. Anything else?

A. It has to be used in mining; you cannot waste your water.

Q. Where did you ever mine besides in Alaska?

A. I have been in Dawson.

Q. How long were you in Dawson?

A. Oh, I was in Dawson for two or three years.

Q. When was that?

A. I went in there to Dawson in 1899.

Q. When did you come out?

A. Well, I came out of there in 1901 or '2, I wouldn't say which.

Q. 1901?

A. No, it was later than that that I came out; it was in 1902.

Q. Where had you been living prior to that time?

A. I had been below; I had been down in Washington.

Q. Have you lived in Alaska ever since you came back from the Yukon?

A. No, not since I came back.

Q. Where have you been living?

A. Well, since I came back here I went in—

(Testimony of Al Wilson.)

Q. Just give me the length of time you have lived in Alaska, in the Harris Mining District. [1189—1039]

A. Since I came out I have been here since 1892.

Q. 1892? A. I should say 1902.

Q. You have been here in the Harris Mining District? A. Yes, sir.

Q. What have you been following?

A. Prospecting and working around the mines.

Q. Who have you been working for?

A. Well, I worked here on McGinnis Creek, and I worked on Montana and Windfall Creek, in placer.

Q. Have you ever worked in quartz?

A. Yes, I have done assessment work, and worked some in quartz.

Q. Do you know whether Montana Creek is in the Harris Mining District or not?

A. I don't think it is; in fact the way the lines run it cannot be.

Q. Well, what placer mining have you done in the Harris Mining District?

A. Well, I haven't done any in this district.

Q. What water location notices have you made in the Harris Mining District?

A. Never put up any.

Q. Have you talked over with anyone since you have been subpoenaed here as a witness about what the supposed miners' rules in relation to location water are? A. No, sir.

Q. You haven't talked it over with anyone at all?

A. No, not to find out any information at all.

(Testimony of Al Wilson.)

Q. When was the last time that you talked with anyone, outside of any talks you may have had since this was commenced, about the location of water?

A. Well, I don't know, for I have had no occasion to use it.

Q. You wouldn't have occasion to talk to anyone about it then, would you? [1190—1040]

A. Not since I came out; I saw the by-laws then that were out.

Q. That is, not since you came out from the Yukon?

A. Yes; when I came out the first time—when I came out in '91—when I came out the first time, you know, from the inside.

Q. 1891?

A. Yes; when I came out the first time.

Q. And it is since that time that you have had no occasion to talk with anyone about it?

A. No, I have had no occasion.

Q. Not having any water location notice to make you never looked up to find out what the custom was, or anything of that kind, as to how you would have to make a water location notice? A. No.

Q. Now, when was it you said you left here to go to the Yukon?

A. I left here in the first place in 1888; then I came out the first time in 1891.

Q. Then, you mean to say that since you left here in '88 to go into the Yukon you haven't heard any discussion about how they had to make water location notices?

(Testimony of Al Wilson.)

A. I was telling you that when I come out I did.

Q. In what year? A. 1891.

Q. You were not going to make any water location notices yourself, were you?

A. No, but my partner, Mr. Howard, that was here, I was stopping with him, and we got talking and he showed me the rules at that time.

Q. The same rules you had seen before?

A. Yes, the same thing.

Q. Did you make any water location notice?

A. No, sir.

Q. He just showed you the rules?

A. Showed me at that time to see if there was any change. [1191—1041]

Q. You wanted to look them over and see if there had been any change since you left? A. Yes, sir.

Q. And you looked them over and found out there had not been any change?

A. Not in the water part.

Q. And you concluded that they were in force and effect, as they had been in '88? A. Yes, sir.

Q. That is the way you arrived at the conclusion, is it? A. Yes, sir.

Q. When were you subpoenaed here as a witness in this case?

A. No, sir; I have got no information whatever; when he asked me if I had seen one of those books before, that was all.

Q. Who asked you that?

A. Why, he asked me if I had seen one before.

Q. Mr. Hellenthal? A. Yes, sir.

(Testimony of Al Wilson.)

Q. I will ask you this; you were here in '86,—did you ever attend any of those miners' meetings?

A. No, sir; I never did.

Q. You didn't attend any meeting here of the miners in 1888? A. No, sir.

Q. Did you ever attend any meeting of the miners' organization? A. No, sir.

Judge WINN.—That's all.

(WITNESS EXCUSED.) [1192—1042]

The plaintiff, further to maintain the issues on its part, introduced as a witness, in rebuttal, HENDRICK HENDRICKSON, who, being then duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

**Testimony of Hendrick Hendrickson, for Plaintiff
(In Rebuttal).**

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your full name.

A. Hendrick Hendrickson.

Q. Where do you live? A. In Juneau.

Q. Did you ever work for the Alaska-Juneau Gold Mining Company? A. Yes.

Q. Did you work for them in the month of October, 1910? A. Yes.

Q. Did you work for them on the 3d day of October, 1910—were you working for them on that day? A. Yes, sir.

(Testimony of Hendrick Hendrickson.)

Q. Where were you working on that day, October 3d, 1910?

A. At the canyon at Gold Creek near Snowslide Gulch.

Q. Do you remember when a dam was put in in Gold Creek? A. Yes.

Q. Were you there at that time? A. Yes.

Q. You know where the dam is now in Gold Creek? A. Yes.

Q. Were you present at the time that the first dam was put in? A. Yes; I was there.

Q. When was that? When was it, do you remember, when that first dam was put in?

A. We put a box in October 3d. [1193—1043]

Q. When you put the box in on October 3d did you put a dam across the creek?

(Not answered because of objection.)

Q. When you put the box in, did you put in anything else besides the box?

A. The first thing when we put that box in between them boulders outside, and after that we built the dam.

Q. You built the dam the same day?

A. No; not the same day; we worked there that next day.

Q. Were you there that evening? A. Yes, sir.

Q. Did you put the poles across the creek and turn the water in that evening?

(Not answered because of objection.)

Q. When did you put the poles in across the creek and turn the water in?

(Testimony of Hendrick Hendrickson.)

A. Water was running in when we built the dam, and when we built the dam there was more water; water was running there that way before we put the box in, the first piece of flume, and then the water run through the flume.

Q. Do you know where there was a brushed out line along there on the hillside? A. Yes, sir.

Q. Where did you put the dam and the box—above or below that line—up the creek or down the creek? A. Down the creek.

Q. Do you know where the falls are there—where did you put that box and dam—was it near the falls? Where did you put the dam and box with reference to the falls—near the falls or a long ways away from it? A. Near the falls.

Q. Do you know where the man was drilling the rock in the afternoon? [1194—1044] A. Yes.

Q. Who was that man? A. Eli Mackey.

Q. Was there anybody else helping him?

A. Two there.

Q. Two men drilling? A. Yes, sir.

Q. Where was that rock?

A. Right below that big one—that is the small one (indicating) and the big one laid up to that small one.

Q. Was it near the falls? A. Yes, sir.

Q. Where was it from that line that was brushed out over the hill? A. That is below.

Q. Was there ever any dam or flume box put in above that line?

(Objection, and question asked again.)

(Testimony of Hendrick Hendrickson.)

Q. Did you ever put in any dam or flume above that brushed out line, up the creek from that brushed out line?

A. I couldn't say very well; on the left-hand side going up the creek the pole was across the creek; I couldn't say very well; I didn't see down the creek; when you are walking down the creek you cannot see so well like up the hill.

Q. Was that the only dam and flume you put in? You never put in any other dam or flume, did you?

A. Afterwards?

Q. No, before. That was the first one you put in, wasn't it? You understand me, don't you? You didn't put a dam or flume at any other place except that place, did you?

(Not answered because of objection.)

Q. Now, that dam and flume that you put in that time when you first put it in, is that in the same place the dam is now?

A. Yes; that is the same place.

Mr. HELLENTHAL.—That is all. [1195—1045]

Cross-examination.

(By Judge WINN.)

Q. On the first day, you put a flume or box in the creek?

A. Yes; the first day we put the box and the poles across; we have to cross the creek to get that box in, and there was a little brush—there wasn't much dam—that was fixed afterwards.

Q. You had to have poles there to get across?

A. To get across to get that box in; that was on the

(Testimony of Hendrick Hendrickson.)

left-hand side and the box was on the right-hand side going up the creek, and we had poles and planks we put there, and then when we built the dam we got to brush all the river bank and throw the brush and whatever we could get, and put the box in, and that is the way that first flume was put there.

Q. What day did you do that—was that the 3d or 4th of October?

A. On the 3d, and again then on the 4th.

Q. What did you do on the 4th?

A. Was working there fixing up.

Q. What did you fix up?

A. That dam, after that pole was put in between the boulder.

Q. What time on the morning of the 4th did you go up there? A. Seven o'clock.

Q. What did you see when you got up there; was the box there in the water?

A. Box was mashed that time.

Q. It was mashed? A. Yes, sir.

Q. What did you work at up there on the 4th?

A. I couldn't say so well; we was there.

Q. Do you remember what you did on the 4th?

A. We might go back and work at the tunnel.

Q. You didn't go back up there on the 4th?

A. Oh, I went back in the morning. [1196—1046]

Q. What did you do on the 4th? Did you stay up there all day?

A. I don't remember if I stayed there; I might go back and work on the tunnel; I don't remember.

(Testimony of Hendrick Hendrickson.)

Q. You mean you came on down the creek and worked?

A. I might; that is the way in my mind, that I go down the 4th.

Q. Were there any poles up there on the morning of the 4th, across the creek—up where the box was on the 3d, was there any poles there on the 4th?

A. I don't know.

Q. You were working on a tunnel on the 4th—is that the tunnel down—

A. Might don't work in the tunnel that time; might work on flume grade; other fellows working in the tunnel; I don't work in the tunnel.

Q. You didn't work on the dam on the 4th, did you?

A. I didn't work on the tunnel; I worked on the flume grade.

Q. The Alaska-Juneau flume grade?

A. Yes, sir.

Q. Did you help to build the big dam?

A. Yes, sir.

Q. This dam that is up there now? A. Yes, sir.

Q. What did you do in building that dam—what did you work at? A. I put that dam there.

Q. Did you work on the big dam that is there now, and completed? A. Yes.

Q. When did you work on that? A. 1911.

Q. You put in the big dam that is there now?

A. Part of it; I didn't do that part that was below the rock.

Q. One part of the dam you didn't touch in 1911,

(Testimony of Hendrick Hendrickson.)

but there was another part that you moved around a little, down the creek?

A. Yes; to the left-hand side of the creek, we moved down; and [1197—1047] the other in just the same place, up by that rock.

Q. On the left-hand side of the creek as you go up, in 1911 you moved that part of the dam down a little? A. A little, yes, below that first one.

Q. You moved it down the creek a little?

A. Yes.

Q. Do you remember what time that was in 1911—was it in the fall of the year, or in the summer, or when? A. Fall.

Judge WINN.—That's all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. The main dam where the intake was—the box was, that you didn't touch in 1911? A. No.

Mr. HELLENTHAL.—That's all.

Judge WINN.—That's all.

(WITNESS EXCUSED.) [1198—1048]

The plaintiff, to further maintain the issues on its part to be maintained, introduced as a witness, in rebuttal ARTHUR KUNIZ, who, being then duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

**Testimony of Arthur Kuniz, for Plaintiff (In
Rebuttal).**

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your full name. A. Arthur Kuniz.

Q. Where do you live? A. Live in Juneau.

Q. Did you ever work for the Alaska-Juneau
Gold Mining Company? A. I have.

Q. Did you work for them in October, 1910?

A. I did.

Q. Did you work for them when the dam was put
in? A. I did.

Q. What was the day that the dam was first put
in? A. That was the 3d day of October, 1910.

Q. What time of the day did you first put the dam
in on the 3d day of October, 1910?

A. I don't remember the time; it was somewhere
about 9 o'clock in the evening.

Q. What did that dam consist of and how was it
put in?

A. The lower part of it we put in some logs, and
then the upper end of it was put in with brush and
rocks.

Q. Did you put in anything except the dam at
that time? A. Put in the box.

Q. Now, did you notice at that time a brushed
out line extending across the creek? A. I did.

Q. Where was that dam and box, about, with
reference to that [1199—1049] brushed out line,
above it or below it? A. Just below the line.

(Testimony of Arthur Kuniz.)

Q. Did you notice the falls there? A. I did.

Q. Where was the dam with reference to those falls? A. The dam was just above the falls.

Q. Did you notice where the rock was that was drilled out on that afternoon? A. Yes, sir.

Q. You saw the men drilling the rock, did you?

A. Yes, sir.

Q. Where was that rock with reference to the dam that was put in?

A. The dam was constructed across from the rock.

Q. Where was that rock with reference to the brushed out line, above it or below it?

A. Just below the line.

Q. Did you put any other dam or flume above the brushed out line at any time?

A. No; not that I know of.

Q. Have you seen the Alaska-Juneau dam since the time you first put the dam in? A. I have.

Q. Where was the dam as you first put it in on the night of October 3d with reference to where the dam now is? A. It is in the same place.

Q. Where was the intake with reference to where it now is? A. Same place.

Q. Where was the flume with reference to where it now is? A. Same place.

Mr. HELLENTHAL.—You may cross-examine.
[1200—1050]

Cross-examination.

(By Judge WINN.)

Q. Don't you know that you never put in any dam up there on October 3d?

(Testimony of Arthur Kuniz.)

A. The dam was put in before we put in the box, I believe.

Q. You never put anything but two logs across the creek to walk across, did you?

A. The logs were put in first, and then we got some brush and laid it across the logs.

Q. How many logs—two or three?

A. I forget the number.

Q. Would you say there was over two? A. No.

Q. You walked over those logs when you swung the box around in the middle of the creek, didn't you? A. Maybe we did; I have forgotten.

Q. How much brush did you put in there?

A. I wouldn't be positive of that; the brush laid in the creek there.

Q. Don't you know the water was so high in the creek you could not put any brush in the creek and hold it in?

A. We rolled in some big boulders on top of the brush to hold it down.

Q. And you put in the two logs and some brush?

A. Yes.

Q. Did you go back up there on the morning of the 4th? A. I did.

Q. What did you see there on the morning of the 4th, if anything?

A. The dam was still there; the box was smashed up.

Q. What do you mean by dam?

A. The dam that was put in there on the 3d.

Q. You mean those two logs and that brush that

(Testimony of Arthur Kuniz.)

was put in? A. Yes. [1201—1051]

Q. Did you work on the 4th up there?

A. Yes, sir.

Q. On the 5th? A. On the 5th also; yes, sir.

Q. You helped build the first dam, did you?

A. Yes, sir.

Q. It has never been changed any, you say?

A. Not to my knowledge, no.

Q. When did you see it last?

A. About a week ago.

Q. You will swear to the Court it has never been changed since it was built? A. No.

Q. Not a bit?

A. On the upper end some logs were put on since that.

Q. That is all that has been changed?

A. That is all that has been changed.

Q. But the dam, clear across the creek, runs along the same line that it always ran? A. Yes, sir.

Q. Did you hear Hendrickson's testimony awhile ago? A. I didn't; I was outside.

Q. If Hendrickson said he helped put those boards across the creek to walk across on, what do you know about that?

A. I suppose they were put there for that purpose first.

Q. You knew they were at that time?

A. No, sir; I don't believe so.

Q. Those two logs that you put across there on the evening of the 3d are still in the creek, are they?

A. No, I don't know about that; I couldn't tell;

(Testimony of Arthur Kuniz.)

the last time I was up there there was so much water I couldn't see nothing.

Q. You don't know whether the dam is in the same place that those two logs were put in to walk on, or not, do you?

A. The dam is in the same place. [1202—1052]

Q. Never been moved up or down the creek?

A. Not that I know of.

Q. You have seen it—is there any change in it?

A. No.

Q. No change at all? A. No.

Judge WINN.—That's all.

(WITNESS EXCUSED.)

(Whereupon Court adjourned until 10 o'clock tomorrow morning.) [1203—1053]

MORNING SESSION.

August 7, 1914, 10 A. M.

The plaintiff, to further maintain the issue on its part to be maintained, introduced as a witness in rebuttal GUS WACHTER, who being then duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of Gus Wachter, for Plaintiff (In Rebuttal).

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is Gus Wachter? A. Yes, sir.

Q. Where do you live, Mr. Wachter?

A. Douglas.

(Testimony of Gus Wachter.)

Q. Have you ever worked for the Alaska-Juneau Gold Mining Company? A. Yes, sir.

Q. Did you work for them in the month of October, 1910? A. Yes, sir.

Q. Do you know where Snowslide Gulch is?

A. Yes, sir.

Q. And where the Alaska-Juneau flume and dam are in that neighborhood? A. Yes.

Q. Were you present on the 3d of October, doing work in the neighborhood of where the Alaska-Juneau dam now is? A. Yes, sir.

Q. What were you doing there at that time?

A. We set the box up over where the water was to go through, then we set the timbers on it and throwed some brush and rock and everything what we could get loose to make a dam.

Q. When was that? A. October 3d.

Q. Now, where was that dam put in—you know where the dam is now, Mr. Wachter? A. Yes, sir.

[1204—1054]

Q. Where was that dam with reference to where the dam now is?

A. That dam we built on October 3d?

Q. Yes. A. Same place.

Q. Where was the box put in, or headgate or flume, with reference to where the headgate and flume now are?

A. There was a brushed out line on the left-hand side going up stream, of the dam.

Q. Did you understand my question? Where was the intake to the box that you put in on October

(Testimony of Gus Wachter.)

3d with reference to where the intake of the Alaska-Juneau flume now is—in a different place or the same place it now is? A. Same place.

Q. Did you notice that brushed out line on the hillside on October 3d? A. Yes, sir.

Q. Where was the dam put in by you on October 3d with reference to that brushed out line—was it above it or below it? A. Below it.

Q. Where was the flume put in with reference to that brushed out line—above it or below it?

A. Below it.

Q. Do you know where some rocks were drilled in the creek at that time? A. Yes, sir.

Q. Who drilled those holes?

A. I drilled them myself.

Q. Did anybody help you? A. Yes, sir.

Q. Who was that? A. Eli Mackey.

Q. Where were those rocks drilled with reference to the place where the dam now is? [1205—1055]

A. Alongside the dam.

Q. That was right alongside the dam as it was put in on October 3d? A. Yes, sir.

Q. Do you know where the falls are there?

A. Yes, sir.

Q. Where was the dam that you put in on October 3d with reference to the falls?

A. I don't understand.

Q. That dam that you put in on October 3d, was it near the falls? A. Yes; near the falls.

Q. Where was the flume, the intake, just above the falls? A. Yes.

(Testimony of Gus Wachter.)

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. Did you ever testify in this case before?

A. No.

Q. You have never been on the witness-stand before?

A. Never been in the courthouse in my life; this is the first time.

Q. Do you work for the Alaska-Juneau or Treadwell people? A. Yes, sir.

Q. How long have you worked for them?

A. Oh, I don't remember exactly; I worked there six or seven months, might be a little over.

Q. Six or seven months when? A. In 1910.

Q. Are you working for them now?

A. I am working for the Treadwell mine now in Douglas.

Q. That is the mine that Mr. Kinzie is superintendent of? A. Yes, sir. [1206—1056]

Q. And he also holds an office and looks after the work over here on this side for the Alaska-Juneau Company, don't he?

A. I guess he does; I never asked him.

Q. Do you know Hendrickson, the man that testified yesterday? A. Yes, sir.

Q. He is working for them now, isn't he—in the employ of the Alaska-Juneau people?

A. I don't know.

Q. You don't know where Hendrickson is working now? A. I don't know.

(Testimony of Gus Wachter.)

Q. You were up on this place on Gold Creek on October 3d—what time did you get there?

A. Oh, I was there the first of October.

Q. What were you doing up there on the first of October? A. Oh, I was working around that place.

Q. Working around what place?

A. On the ditch there a little while, and then they called me up to the dam on the third.

Q. There wasn't any dam up there on the first, was there,—What date was the first time you did any work up there about where the dam is now?

A. Third.

Q. You were working farther down this way before the 3d, were you?

A. On the lower side, down stream.

Q. Now, then, the dam that you talk about as being put in on the 3d had two logs put across the creek, didn't it? A. Yes, sir.

Q. Two logs put across the creek, and you put those logs there so you could put some flume out in the creek, didn't you?

A. No; we put a box on it, and then we put some brush and rocks to hold the water up.

Q. You put some brush in there—the creek was pretty high—there [1207—1057] was a good deal of water in the creek, wasn't there?

A. Yes, sir; some.

Q. Ran pretty swift, didn't it?

A. A man could fix it all right.

Q. Now, did you go back up there on the morning of the 4th? A. Yes; we were down there.

(Testimony of Gus Wachter.)

Q. What were you doing up there on the morning of the 4th?

A. We started drilling and making a place for the water flume.

Q. You drilled and made a place for the water flume, and that was on the 4th? A. That is the 4th.

Q. Where did you make that place for the flume on the 4th?

A. Alongside of the dam, and to the lower side.

Q. You commenced on the morning of the 4th, then, to get a place so you could put the flume in?

A. We had the place started already on the 3d.

Q. But you hadn't finished it?

A. We had a dam put in and finished it already.

Q. The thing that you call the dam is the thing that had two logs across the creek, and some brush thrown in up above it—that is what you refer to now when you are talking about the dam?

A. We done that on the 3d.

Q. Did you work on the dam where it is now—did you do any work on that dam where it is now, up on Gold Creek? A. I don't understand you.

Q. When did you see the Alaska-Juneau Company's dam in Gold Creek? A. Last, you mean?

Q. Last; yes, sir. A. Last Thursday.

Q. Now, did you help put that dam in—did you work on that dam that you saw last Thursday when it was built? [1208—1058]

A. No, I never worked on that dam since October 3d.

Q. You quit working on any dam on October 3d?

(Testimony of Gus Wachter.)

A. Yes; I did.

Q. And you worked on down the creek on the grade? A. Yes.

Q. About a week ago you saw the dam—when you saw it before a week ago—

A. I never was there before except on the 3d of October.

Q. You were up there on the 3d of October, and then you were up there last Thursday?

A. Yes, sir.

Q. And those are the only two times you have been up there where the dam is? A. Yes.

Q. When you were up there last Thursday did you notice any brushed out line up the hill from where the dam is? A. Yes, sir.

Q. On October 3d you had some people trying to keep you off of the ground up there, didn't you?

A. Yes, sir.

Q. And they drove you away once, didn't they, on October 3d?

A. Yes; they did all right; threw some rocks and everything on us.

Q. What did you think they were doing that for?

A. I couldn't tell you.

Q. Mr. Kinzie was up there, wasn't he?

A. Yes, sir.

Q. You were just obeying the orders of Mr. Kinzie?

A. I was working up there; Mr. Kinzie had a lead man, and Mr. Kinzie told the lead man what to do.

(Testimony of Gus Wachter.)

Q. And they ran you off once on that day, and then you went back again, did you? A. Yes, sir.

Q. How did you go up to this place where you say you put these [1209—1059] two logs across the creek and put some brush in—did you go up the Basin road, that well traveled road, or did you go up the creek bed?

A. Some go on the other side, on the left-hand side of the creek, and some of them go up on the right-hand side; I went on the right-hand side.

Q. You went on the right-hand side as you went up the creek? A. Going up the creek.

Q. You went up that way?

A. Yes; I passed the creek about 100 feet away from the dam, across the creek.

Q. About 100 feet from where the dam is now?

A. Yes; going across that way on the place we were working.

Q. Was the place where you crossed the creek 100 feet above where the dam is now or 100 feet below where the dam is now? A. Below.

Q. And then you crossed the creek there and went on up the creek? A. Yes.

Q. How far did you go up the creek that day from that point?

A. Went on the place we were working then.

Q. How did the people that belonged to your crew get up there, that went up on the left-hand side of the creek—did they go up the Basin road, or did they go up the old flume line of the Jualpa Company?

(Testimony of Gus Wachter.)

A. I don't remember all about the dam, because I don't remember about it.

Q. Where did you make that box or piece of flume that you put in on the 3d of October?

A. Made over there close to the dam.

Q. Now, don't you know that before October 3d there wasn't,—or on October 3d, there wasn't any place down below where this dam is now constructed that you could get across the creek,—didn't you cross above where the dam is now?

A. Down below where the dam is now. [1210—1060]

Q. Don't you know there wasn't any place there you could get across on October 3d?

A. Some places there was; yes.

Q. How did you get across?

A. Jumped across it.

Q. How many jumps did you have to make to get across it?

A. I can make it in one good jump, 10 feet or something like that—7 or 8 feet; I couldn't tell how long they are; some places it is pretty narrow there, you know.

Q. You say about 100 feet below where that dam is now that that is the place where you jumped over from one bank to the other? A. Yes, sir.

Q. Have you looked at that place lately—have you ever seen that place where you jumped over?

A. Yes, sir.

Q. Are you a pretty good jumper?

A. Not very good, but I can do that all right—

(Testimony of Gus Wachter.)

jump across that creek.

Q. You didn't get down in the water at all, didn't get wet? A. I didn't get wet; no.

Q. How did you get up where the falls were when you jumped over the creek?

A. Why, over the hill a little ways where that old flume is up there, and I walked some part of it on that water flume and some part of it along the hill-side.

Q. You jumped across, then, to the right-hand side as you went up the left-hand side of the creek, about 100 feet below where the dam of the Alaska-Juneau Company is now? A. Yes, sir.

Q. And didn't get wet?

A. I didn't get wet to amount to anything—working men always get wet some.

Q. You didn't fall in the creek or wade in the creek, or go in the creek up to your knees? [1211—1061] A. No, sir.

Q. Then you went on up to the falls in the creek on the right-hand side—how far did you go above the falls? A. To the place where the dam is.

Q. To the place where the dam is now?

A. To the place where the lead man said we go to work down below the present line where it is now, the same place, and we done the work on the same place.

Q. You didn't do any work above where the dam is now? A. No, sir.

Q. Were any of the boys that were with you doing anything up above where the dam is now?

(Testimony of Gus Wachter.)

A. I didn't watch anybody; I was working.

Q. What were you working at?

A. Working on the dam.

Q. What were you doing?

A. Drilling and doing what the lead man told me to do.

Q. What were you drilling on?

A. Some holes in a rock,

Q. In the middle of the creek was the rock or boulder, wasn't it?

A. I didn't tell you exactly it was in the middle; it was in the creek all right.

Q. It was in the creek bed? A. Yes, sir.

Q. You were told to drill a hole in that rock?

A. Yes, sir; I did.

Q. What were you going to do after you drilled a hole in it? A. Blast it.

Q. Did you blast it? A. I did.

Q. Was that on the 3d?

A. Yes. [1212—1062]

Q. Did you drill on any other rock that day, that you blasted?

A. We drilled two or three different places there.

Q. And blasted each place? A. No, sir.

Q. You didn't blast other places where you drilled? A. No, sir.

Q. But the boulder that was down in the creek that you first drilled on, you did blast?

A. Yes; we blasted that all right.

Q. Now, where were the other boulders you drilled on? A. Why, close to the box.

(Testimony of Gus Wachter.)

Q. Well, there wasn't any box in there then, was there?

A. Yes; we drilled the hole first and then put the box in on the same day.

Q. Did you put the box in just where you blasted out the rocks? A. No; on the side.

Q. On the side of where you blasted? A. Yes.

Q. Now, all that I understand you did on October 3d in regard to building a dam was to put two logs across the creek and put some brush in—now, those are the only two logs that you put in on the dam on the 3d? A. Yes, sir.

Q. Now, you didn't put any cross-pieces in on that day, did you?

A. Yes; we had two timbers on the cross-ways of the creek, and that timber was about one foot, or something like that.

Q. That is, you put the timbers in to hold these two logs together that you put across the creek?

A. Yes; to hold it up, like you hold your fingers—put one on top and one underneath.

Q. How long was that piece?

A. I would say about a foot—it might be a little over.

Q. It was just put in there to hold the logs apart?

A. Yes. [1213—1063]

Q. And you used those logs that you put in there to walk over on, didn't you, to cross the creek on?

A. No; we used the logs, and put the brush in and everything to hold it up to make the dam.

Q. Didn't you walk on it any?

(Testimony of Gus Wachter.)

A. We walked on it.

Q. Walked back and forth across the creek on those logs? A. Yes; we did.

Judge WINN.—That's all.

Mr. HELLENTHAL.—That's all.

(WITNESS EXCUSED.) [1214—1064]

The plaintiff, to further maintain the issues on its part to be maintained, introduced as a witness in rebuttal B. D. STEWART, who, being then duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of B. D. Stewart, for Plaintiff (In Rebuttal).

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is B. D. Stewart? A. Yes.

Q. What is your business profession or occupation, Mr. Stewart? A. Engineer and surveyor.

Q. You are a mineral surveyor—a United States mineral surveyor? A. I am.

Q. With offices in Juneau, Alaska?

A. Yes, sir.

Q. Did you do any work for the Alaska-Juneau Gold Mining Company in the year 1910?

A. I did.

Q. Do you know where the Alaska-Juneau dam is? A. I do.

Q. When were you first at the place where the Alaska-Juneau dam now is?

(Testimony of B. D. Stewart.)

A. It was in the first week of November, 1910.

Q. Did you at that time survey the lower side line of the Lotta? A. I did.

Q. Do you know where the stakes in the ground were on the Lotta at that time, marking the south-erly side line of the claim? A. I do.

Q. What stakes were there—what corners were marked with stakes?

A. There were two corners marked for the Lotta.
[1215—1065]

Q. What were they?

A. One was the southwest corner and the other the northwest corner.

Q. What were the numbers of the corners?

A. They were in the places as called for corners No. 5 and No. 6.

Q. Now, did you survey the line across the creek between those two stakes? A. I did.

Q. Do you know where the lower side line of the Lotta as marked upon the ground by those two stakes would fall with reference to the position of the dam and intake of the Alaska-Juneau Gold Mining Company as it was upon the ground at that time?

A. I do.

Q. Do you know that from an actual survey and measurements made by you? A. I do.

Q. Where was the intake of the Alaska-Juneau Company's flume at that time as you found it upon the ground by an actual survey, with reference to the lower side line of the Lotta as marked by the stakes on the ground at corner No. 5 and corner No. 6?

(Testimony of B. D. Stewart.)

A. The intake was several feet below the line.

Q. Where was the dam as you found it upon the ground with reference to that line of the Lotta—that is, the line of the Lotta as marked by the stakes on the ground at corner No. 5 and corner No. 6?

A. The dam structure was below that line on the northeasterly bank of the stream; there was a bank of earth which angled up the creek a little, and part of that bank of earth was on the Lotta.

Q. How much of it was on the Lotta, as so marked?

A. I don't remember the exact amount—just a few feet; that bank of earth seemed to be a protection for that abutment of the dam, but my recollection is that the dam proper was [1216—1066] below the line.

Q. Now, Mr. Stewart, have you seen the dam since that time? A. I have.

Q. What changes, if any, have been made in the position of the dam on the ground?

A. The only change that I can observe is that the northwest end of the dam had been moved several feet down stream since that time.

Q. The northwest end—that would be the place where the dirt had been piled up on the Lotta?

A. Yes, sir.

Q. The balance of the dam and the intake is in the same position? A. Same position.

Q. Now, do you know whether any portion of the dam, as it now is, is on the Lotta claim as marked by those stakes upon the ground at corner No. 5 and

(Testimony of B. D. Stewart.)

No. 6? A. I believe I do.

Q. Is any portion upon the Lotta? A. No, sir.

Q. Mr. Stewart, I now direct your attention to a map marked and received in evidence as Defendant's Exhibit "B," and ask you to look at that and state if you are familiar with that map?

A. I think I am familiar with the original of it; this seems to be a copy.

Q. Who made the original?

A. I made the original.

Q. Do you know what that map is intended to show? A. Yes, sir.

Q. Please tell the Court what it is intended to show.

(Not answered because of objection.)

Q. What does the map show, Mr. Stewart?

A. It shows the position of several claims in the vicinity of the Ebner property in relation to Gold Creek and the Basin Road. The map, by means of circling of certain of the corners, [1217—1067] shows which points are defined by posts on the ground; and by the absence of those circles, corners which were arrived at in another way not indicated by posts; shows the dam and various other features of the topographic and artificial improvements.

Q. It shows the position of the Oregon lode on the ground? A. It does.

Q. It shows the claimed conflict between the Oregon lode and other claims in the neighborhood?

A. It does.

Q. Mr. Stewart, will you tell the Court whether

(Testimony of B. D. Stewart.)

you made that map with the view of showing the ground that actually belonged to the parties, or with the view of merely showing where each claim lay with reference to where the parties claimed it laid, without reference to their rights?

A. I made the map to show these claims merely as they were claimed by the parties without any reference to their rights.

Q. Now, Mr. Stewart, I will ask you if you are familiar with, and have made an actual survey of, the Lotta claim—are you familiar with that claim and whether you have surveyed it?

(Objected to.)

Q. Well, in 1910, did you make a survey of the Lotta claim? A. Yes.

Q. Are you familiar with the field-notes of the Lotta claim? A. I am.

Q. Are you familiar with the plat that is shown in the patent of the Lotta claim? A. I am.

Q. Are you familiar with the official plat in the Surveyor General's office, of the Lotta claim?

A. I am.

Q. Are you familiar with all the stakes on the ground, that are connected with the Lotta claim?

A. I am. [1218—1068]

Q. Are you familiar with the location of the stakes of the Colorado and other surrounding claims?

A. Those that are in the ground; yes, sir.

Q. Do you know where corner No. 5 of the Idaho is? A. I do.

Q. Did you observe the brushed out line in that

(Testimony of B. D. Stewart.)

vicinity in 1910? A. I did.

Q. Do you know the brushed out line connecting No. 5 and No. 6 of the Lotta? A. Yes.

Q. Did you do anything in the way of surveying the creek in 1910? A. I did.

Q. Do you know where the Lotta claim would fall upon the ground—where it would light upon the ground if surveyed in accordance with the field-notes given in the patent, and the ties and calls given in the patent? A. I do—I think I do.

Q. Do you know what the calls in the patent are, as shown in the patent plat attached to the patent?

A. Aside from the courses and distances I believe there is only one call.

Q. What call is that?

(Objected to.)

Q. Directing your attention to the patent of the Lotta as it is in evidence in this case, marked Defendant's Exhibit "U," I direct your attention to that as being the patent of the Lotta claim, and also to the plat that is shown in that patent. Now, directing your attention to that patent, Mr. Stewart, the Lotta claim there is tied to Gold Creek, is it not?

A. It is.

Q. Is the Lotta claim tied to any other natural object in the description given in that patent?

A. No, sir. [1219—1069]

Q. Now, when did you survey the Lotta claim?

A. November, 1910, first.

Q. Did you ascertain at that time where the claim would lie if surveyed in accordance with those patent

(Testimony of B. D. Stewart.)

notes, giving effect to the ties in the creek as shown in the patent? A. I did.

Q. Now, Mr. Stewart, is the claim as so surveyed shown upon Defendant's Exhibit "B"?

A. Yes, sir.

Q. It is? A. Yes.

Q. Do you know where the point was where the Mulligan water notice was posted?

A. I am not familiar with that point.

Q. You don't know that point? A. No, sir.

Q. You may indicate to the Court how the claim as surveyed according to the field-notes as contained in the Lotta patent, and with reference to the tie in Gold Creek, the only tie to a natural object contained in the patent, as to how it would fall upon the ground,—on Defendant's Exhibit "B."

A. It would fall upon the ground as indicated upon this map in green lines, and the northeast side line of the Lotta as it so falls, is marked "N. E. side line of Lotta, according to Patent Notes."

The COURT.—Those are the only green lines on the plat?

A. They are the only green lines which purport to show the Lotta claim.

Q. The green line that you have testified to as being the line of the Lotta is the one marked with the legion you have just referred to? A. It is.

Q. Do you know where the Colorado claim lies?
[1220—1070] A. I do.

(Testimony of B. D. Stewart.)

Q. Is the Colorado claim tied to the Lotta claim in the field notes?

(Not answered because of objection.)

Q. I will just ask the general question—Mr. Stewart, as tied to any of the surrounding claims, whether the Colorado or any other claim, would the Lotta claim fall upon the ground at the place where it is marked by the stakes in the ground at No. 5 and 6?

(Objection.)

Mr. HELLENTHAL.—The question I am asking this witness, your Honor, at the present time is this: Is there any stake or corner on the ground, of any claim, it makes no difference what claim, to which the Lotta lower side line can be tied according to the description as given in the official notes in the Surveyor General's office and carried into the patents of the various claims, so that the side line of the Lotta will fall where it was brushed out upon the ground and marked by these stakes?

The COURT.—I think he may answer that question, if he knows.

A. I don't know of any such stakes; no. I am not very familiar with all the patent stakes up there.

Q. You have run lines over all the various patent stakes?

A. I think so—all those that were in existence in 1910.

Q. There was no stake or monument upon the ground of any claim to which you can tie that claim, is there?

(Testimony of B. D. Stewart.)

A. By observing the notes they would show whether you could follow the notes out—

Q. The question is this: Whether that line as marked upon the ground will check with any stake, monument, mark, call or tie as given in the notes or as marked upon the ground of other surveys, other than the Lotta? A. No, sir. [1221—1071]

Q. None whatever? A. No, sir.

Q. Mr. Stewart, have you been up on the Lotta line lately? A. I have; yes, sir.

Q. Do you know where corner No. 3 of the Lotta is? A. I do.

Q. As marked upon the ground?

A. I do; yes, sir.

Q. Do you know where stake No. 3 stood in 1910?

A. I do.

Q. Do you know where the cement or concrete pier now is that is supposed to mark that corner?

A. I know where a concrete pier is in that vicinity.

Q. Does that concrete pier and this stake No. 3 still stand in the same place it did in 1910?

A. It does—same position.

Q. How far is that concrete base or pier from that corner No. 3?

A. It is about 14 feet up the hill—that is, measured on a horizontal place.

Q. About 14 feet from it?

A. Up the hill, northeast.

Q. Directing your attention now to a photograph marked Plaintiff's Exhibit No. 37, I will ask you to look at it and state what that is, if you know?

(Testimony of B. D. Stewart.)

A. The photograph marked exhibit No. 37 indicates in the foreground the post for corner No. 3, of the Lotta, as it existed in 1910, and as it still exists in the same place. This stake is in the foreground of the photograph, and some of the markings in black paint can be made out upon it. In the background is the post which is set in a large pile of stone and concrete. This concrete pile or pier that the post is set in is probably 4 feet square at the base and stands about 3 feet high. [1222—1072]

Q. You took that picture yourself? A. Yes.

Q. When was it taken?

A. It was taken last Sunday, the 2d of August.

Q. Directing your attention now to a photograph which is marked Plaintiff's Exhibit No. 36, I will ask you to look at that and state who took that picture. A. I took that picture.

Q. When did you take that,—the same day?

A. The same day.

Q. What does that show?

A. That shows the same post and the same concrete or cement pier that shows in the background in picture No. 37.

Q. At closer range? A. Yes, sir.

Q. Calling your attention to a photograph marked Plaintiff's Exhibit No. 35, I will ask you if you took that photograph? A. I did.

Q. When was that taken?

A. The same day as the others.

Q. What does that show?

(Testimony of B. D. Stewart.)

A. It shows the old post for corner No. 3 as it is in the ground, and it is the same post as appears in the foreground in exhibit No. 37.

Mr. HELLENTHAL.—I will offer these photographs in evidence.

(Whereupon said photographs were received in evidence and marked, as originally marked for identification, Plaintiff's Exhibits Nos. 35, 36 and 37.)

Mr. HELLENTHAL.—You may cross-examine.
[1223—1073]

Cross-examination.

(By Judge WINN.)

Q. These three photographs that were just last presented to you, by Mr. Hellenthal, Mr. Stewart, all represent the same corner post, do they not?

A. I don't get your full question, Judge.

Q. I say these three pictures that Mr. Hellenthal just presented to you all represent the same corner post, don't they?

A. There are two different posts that appear in the photographs—two different posts; exhibit 37 shows both; in exhibit 35 one appears, and in exhibit 36 another appears.

Q. I wish you would look at this exhibit "S" which has been offered in this case, and state if those photographs show the corner posts that are marked there in red along on the side and end lines of the Lotta claim?

A. Well, exhibit No. 35 represents corner 3 of the Lotta as it appears upon the ground, indicated by a post, of which picture 35 is a photograph.

(Testimony of B. D. Stewart.)

Q. That is—what do you call it,—what corner stake of the Lotta does No. 3 represent on this Defendant's Exhibit "S"?

A. It is presumed to stand for that corner.

Q. How did you say that corner post is marked?

A. It is marked, as I recall, "U. S. S. 87" on one side, and "U. S. S. No. 88" on the other.

Q. You say that stake was there in 1910?

A. It was the same stake in the same place.

Q. When did you first see it there in 1910?

A. November.

Q. November was the first time that you were asked to go up there to make any survey in reference to the Lotta claim? A. Yes. sir.

Q. 1910? A. 1910. [1224—1074]

Q. That survey that you made at that time, and the map which Mr. Hellenthal has referred to, is the map that was made for the purpose of the trial before Judge Cushman, wasn't it?

A. I believe so; yes.

Q. Now, let's get the other stake that you have there in one of those pictures, Mr. Stewart.

A. Exhibit No. 36 shows a stake that is about, as I have indicated, 14 feet northeast of the post which appears in No. 35.

Q. Northeast of post No. 3?

A. Of the old post No. 3 as it stands in the ground.

Q. And that is the monument you say is built there—what is it built of?

A. Rock, cement and concrete.

Q. That is the corner post these photographs refer

(Testimony of B. D. Stewart.)

to? A. This is the corner post.

Q. Now, then, Mr. Stewart, you were never up on the Lotta claim before you made the survey in November, 1910? A. Never was; no, sir.

Q. How long have you been here, Mr. Stewart?

A. I have been here going on 4 years—4 years in October.

Q. You have been in the employ of the Alaska-Juneau Company ever since you have been here, haven't you? A. I have not; no, sir.

Q. How long have you been in the employ of the Alaska-Juneau?

A. I have been employed intermittently by them to do various work ever since I have been here.

Q. You do all their surveying over on this side of the channel, don't you? A. I don't; no, sir.

Q. Hasn't it all been done under your charge since you have been here? A. It has not; no, sir.

Q. What surveying have you been doing for the Alaska-Juneau and [1225—1075] Treadwell since you have been here?

A. I have done a great deal of surveying of different kinds for the two companies.

Q. You have been almost giving your entire time, the last two years to surveying over on this side of the channel upon the properties of the two companies, haven't you?

A. I have been giving it a great deal of time—not all of it.

Q. What other surveying have you been doing?

A. I have been doing quite a lot for other people.

(Testimony of B. D. Stewart.)

Q. Surveying for patents? A. Yes, sir.

Q. Do you work for them by the month or how?

A. I work for them by the day, whatever time I put in for them.

Q. What is the surveying that you have been doing on this property the last two years?

A. Mostly patent work.

Q. Surveying for patents?

A. Surveying for patents.

Q. And surveying some of these claims that belong to the Alaska-Juneau Company?

A. Some of them; yes, sir.

Q. About what proportionate part of the time have you devoted to their work in the last two years?

A. Oh, probably 90 per cent.

Q. Were you, in the months of July and August, in the employ of the Alaska-Juneau Company?

A. July and August?

Q. Yes. A. I was not; no, sir.

Q. When did you commence to work for them in the year 1910?

A. It was about the 10th of October, I believe—about the 10th.

Q. Had you been working for the Treadwell before that?

A. Never had done any work for them before that.

[1226—1076]

Q. What had you been doing, Mr. Stewart?

A. Prior to 1910, immediately prior to that, I had an independent office in Missoula, Montana.

Q. You didn't come here until what date in 1910?

(Testimony of B. D. Stewart.)

A. The 16th of August, I believe it was.

Q. And as soon as you came here, did you commence gathering data for the trial of that ejectment suit on the Lotta and the Parish No. 2?

A. I did not; no, sir.

Q. You were a witness in that case, weren't you?

A. I was a witness; yes, sir.

Q. And you had this same map and plat that Mr. Hellenthal has been questioning you concerning, and you testified from that in that case, didn't you?

A. I made the map from which that is copied; yes, sir.

Q. Your contention at that time was that there wasn't any such claim in existence as the Lotta claim?

A. I don't remember that I made any contention.

Q. According to your map there, you recognize what portion of the Lotta claim you contended was in existence when you testified in that former case, don't you?

A. I don't recognize any particular portion as being in existence that I know of, on that map; I represented what I considered would be the position of the Lotta regarding it in various days.

Q. Then what was your object in making those illustrations that you did, putting in the different positions of the Lotta claim—was it to show that the Mulligan notice was not on the Lotta claim, or was it to show that there wasn't any such claim existing as the Lotta claim?

A. The claim as shown on that map had no refer-

(Testimony of B. D. Stewart.)

ence whatever to the Mulligan notice or any other thing, only to show where the Lotta would be under different conditions as indicated on the map.

[1227—1077]

Q. Now, then, Mr. Stewart, I want you to take the United States patent, a copy of which is offered in evidence in this case, and I will ask you if the Lotta survey No. 87 is not included in that group of surveys that were made at the same time for patent,—that is true, isn't it?

A. It is shown in the map in conjunction with a number of other surveys, apparently.

Q. You have read over that patent, haven't you, that you have in your hand? A. Yes.

Q. You have gone over it to ascertain what ties the Lotta has to any other natural object, have you not?

A. I have.

Q. Now, then, when Mr. Hellenthal asked you these questions as to how many ties the Lotta claim had, what part of the field-notes in this patent did you refer to when you made that answer?

A. As I understood his question, he referred to the Lotta and I referred to the Lotta claim in my answer.

Q. I wish you would turn over and read the part of the description of the Lotta claim that you made your answer to that question from.

A. "Beginning for the description of Lot No. 87, at a post marked No. 1, U. S. Survey No. 87"—

Q. That is on what page of this exhibit which has been offered in evidence, Mr. Stewart, as the patent

(Testimony of B. D. Stewart.)

in which the Lotta claim is one of the claims that was patented—on what page?

A. On page marked 1772, and includes, exclusive of the fractional line at the top of the page, includes lines 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21.

Q. What are the names of the other claims which are set forth in the field-notes of that patent? [1228—1078] A. Included in the same description?

Q. Yes, sir.

A. Taku Gold and Silver, Keystone, the Crown Point, the Golden Fleece, the Grand Review and the Jewel, indicated as being surveys Nos. 88, 89, 90, 92, and 93, respectively.

Q. Now, I will ask you, Mr. Stewart, those claims you know to be all in one group, and contiguous and adjacent, don't you? A. According to what?

Q. According to the surveys and what you know of the ground,—don't you know where those claims are on the ground?

A. Yes; I know where they are staked—where the stakes are on the ground.

Q. You know they are patented, don't you?

A. Yes, sir.

Q. They are the claims as indicated on Defendant's Exhibit "S," and are shown to be all contiguous and adjacent claims, and constitute one group?

A. They are so shown on that map.

Q. Don't you know from surveys you have made, that this is a group of claims that was surveyed all at one time for patent?

(Testimony of B. D. Stewart.)

A. Not altogether at the same time; they were surveyed at different times.

Q. I mean this is one survey made, and you know it to be one survey made for a patent, and that according to the rules, the applications were made all at the same time and it went through to patent and came out in the same patent?

A. I presume they were all patented together from the fact that they are all contained in one patent.

Q. Now, then, Mr. Stewart, if you, as a disinterested professional surveyor, were called upon to go upon the ground to ascertain the location of a mining claim, provided it was a mining claim that was patented with a group, would you go and take the field-notes, and pick them alone out of the patent, and [1229—1079] segregate them from the field-notes of other claims that are described in the patent, and simply try to ascertain what calls one of those claims had in order to locate it on the ground,—would you pursue that method?

A. I would have regard for the rest of the claims if the evidences on the ground warranted it, I think.

Q. Well, now, you know, Mr. Stewart, that in 1910 when you went upon the ground that corner No. 5 as indicated upon Defendant's Exhibit "S" was there, don't you?

A. The post that is there now was there; yes, sir.

Q. And you know following on up the side line of the Lotta claim, as indicated on Defendant's Exhibit "S," that the corner post which is on the side line of the Lotta and which is a little bit below the

(Testimony of B. D. Stewart.)

corner No. 6 was on the ground in 1910, don't you?

A. I know that there was a post which I presume you refer to, there at that time, Judge; it wasn't on the line of the Lotta, as I recall it; it was marked for corner No. 4 of the Forrest, and as far as I know it had no particular reference to the Lotta claim. I never regarded that as having any particular reference to it; it was there and marked on one side No. 87.

Q. Now, then, that is the Lotta survey, isn't it, U. S. Survey No. 87? A. Yes, sir.

Q. Now, if you were going on there in a disinterested way—not trying to throw anything out of shape, but as a disinterested party, acting absolutely fair with everybody, if you had seen a stake there in 1910 and undertaken to locate the Lotta claim, you would have taken that as evidence of some fact as to where the Lotta claim was, wouldn't you?

A. I will say no. May I explain that answer? Not such a post as that; no, sir. [1230—1080]

Q. Now, if there was a particular stake up there, Mr. Stewart, on which was U. S. Survey No. 87, don't you think, if you were acting in good faith as a surveyor, you would take that as evidence that there must be a Lotta claim in that neighborhood, and that that was a corner post?

A. I would regard it as sufficient to investigate it further.

Q. Now, was there any corner post in 1910 when you went on there, of the Lotta, that marked corner No. 6?

(Testimony of B. D. Stewart.)

A. There was a post—a post similar to corner No. 5.

Q. Was there anything written on that post?

A. No, sir; there was scribe marks on it.

Q. What were those scribe marks on it?

A. As near as my recollection serves me, “Cor. 2 Etta”; I am not so sure that the name was on it; anyway, “S. 545,” and on one side “S. 87,”—Something like that; I wouldn’t say those were the exact markings, but approximately.

Q. You know that the Lotta claim is survey No. 87, and have always known it ever since you made any investigations in this matter, don’t you?

A. Yes, sir.

Q. Now, then, have you examined the decree of Judge Cushman in this case to ascertain whether or not he located the Lotta lower side line according to stakes Nos. 5 and 6?

A. I believe I have; yes, sir.

Q. And he located it according to these numbers 5 and 6 as they were in 1910, didn’t he?

A. I believe he indicated that line as they were in 1910.

Q. Now, then, what other stakes besides these I have mentioned did you see there when you were on the Lotta claim in 1910?

A. I saw the old post for corner No. 3, and also for corner No. 4.

Q. I believe you gave how corner No. 3 was marked. Was corner No. 4 marked? [1231—1081]

A. It was, and it is still there.

(Testimony of B. D. Stewart.)

Q. How was it marked?

A. As I remember, it was marked with black paint, "U. S. S. 87"; I don't believe the number of the post was legible.

Q. But the matters you have read were on it?

A. As I remember; yes, sir.

Q. Did you, when you went on there for the first time in November, 1910, see a cabin down near corner post No. 5 of the Lotta claim? A. I did.

Q. Did you ever look up in the field-notes to see whether or not corner No. 5 is tied to corner No. 4, in the field-notes of the survey?

A. I never noticed any such tie as that—don't recall it.

Q. I will ask you, Mr. Stewart, to take the patent which you have there, and I want you to find how many ties there are altogether in this consolidated survey of these claims—I will ask you if there is not a following tie, and that they would all be of assistance to you in locating the Lotta Lode Claim upon the ground as it has been determined to exist? Will you find corner No. 1—what corner post of the Crown Point as it is described in the field-notes of the patent would it tie to? A. Corner No. 1?

Q. Yes, sir; of the Crown Point.

A. Corner No. 2 is tied to U. S. Mineral Monument No. 2.

Q. Is corner No. 2 also tied to the Ebner stamp-mill?

(Testimony of B. D. Stewart.)

A. It doesn't give any tie from the stamp-mill here.

(Whereupon court adjourned until 2 P. M.)
[1232—1082]

AFTERNOON SESSION.

August 7, 1914, 2 P. M.

B. D. STEWART on the witness-stand.

Cross-examination (Cont'd).

(By Judge WINN.)

Judge WINN.—This is a map and plat, if your Honor please, that was apparently offered in evidence on the preliminary hearing. I expected to offer it in evidence upon our surrebuttal, but I desire very much to call Mr. Stewart's attention to it on cross-examination; if you want me to, I will first offer it in evidence by my own witness. I want to question Mr. Stewart on it and then afterwards follow it up and show the authenticity of it.

The COURT.—Very well.

Judge WINN.—I wish to have this exhibit marked for identification, if your Honor please.

(Whereupon said exhibit was marked Defendant's Exhibit "K-2" for identification.)

Q. Now, I understand, Mr. Stewart, that you stated in answer to Mr. Hellenthal's question, and in answer to all of his questions concerning these boundaries, corner posts, and so forth, of the Lotta, that you were bearing in mind simply the field-notes of the Lotta claim as it is set out in this patent, and you didn't take into consideration any of the field-notes, courses and distances of other claims that were

(Testimony of B. D. Stewart.)

patented in the same Lotta group?

A. I took them into consideration; yes, sir.

Q. When you were answering Mr. Hellenthal's questions? A. Yes, sir.

Q. Did you say this morning when I presented the patent to you that you only took into consideration the field-notes which are represented on page 1772 of the patent? [1233—1083]

A. I said that in reply to your question; yes, sir.

Q. Now, how is it—did you just simply take into consideration the field-notes as they appear on page 1772 of the patent that is offered in this case, or did you take into consideration, in answering Mr. Hellenthal's questions, all of the field-notes, courses and distances and ties as they are set forth in this patent?

A. I took them all into consideration; particularly the notes that he called my attention to specifically.

Q. Now, then, I hand you this patent, Mr. Stewart; you observe on page 1771, which is part of that patent, as follows, don't you: "There has been deposited in the General Land Office of the United States the plat and field-notes of survey and the Certificate No. 16 of the ex-officio Register of the Land Office at Sitka, Alaska, accompanied by other evidence whereby it appears that Samuel Coulter did, on the tenth day of June, A. D. 1889, duly enter and pay for that certain mining claim or premises, known as the Lotta, Taku Gold and Silver, Keystone, Crown Point, Golden Fleece, Grand Review and Jewel Lode Mining Claims, designated by the ex-officio Surveyor General as Lots Nos. 87, 88, 89, 90, 91, 92, and 93, re-

(Testimony of B. D. Stewart.)

spectively"—now, you know from the reading of this patent so far, and reading through the rest of it, that all those claims were included in one survey, don't you?

A. It is apparent that they were included in one application for patent; that is all I gather from that.

Q. Well, then, when you read on, the field-notes,—have you read them through, commencing on page 1772? A. Yes.

Q. Don't you know that every one of those claims, when they are surveyed up, will tie to one another?

A. I do not; no.

Q. Now, then, in order to get at that we will read it over: [1234—1084] "Beginning for the description of Lot No. 87, at a post marked No. 1, U. S. Survey No. 87"—now, do you know where that post is?

A. Post No. 1?

Q. Yes, sir. A. It is obliterated, I believe.

Q. I will ask you to look on Defendant's Exhibit "K-2" for identification, which purports to cover these mining claims that I have just given the name of in the patent, and ask you if corner No. 1, which is marked in red at the upper end line of the Lotta, is not the corner post that you understand that survey commences at? A. It is not; no, sir.

Q. What do you understand to be the corner post that the survey commences at in the field-notes?

A. I don't think there is any corner post in existence where that commences at.

Q. There is not any corner post up here marked No. 1? A. No, sir.

(Testimony of B. D. Stewart.)

Q. Now, I wish you would tell the Court—take those field-notes you have in your hand and commence reading, and tell the Court where this survey commences from.

(Not answered because of objection.)

Q. Now, I will call your attention to Defendant's Exhibit "S," and ask you to take those field-notes and a ruler. Can you ascertain from those field-notes where the survey commences?

A. Only from the ties that are given in the notes; I couldn't tell from that map where corner No. 1 is.

Q. Can you look at this map, or take the map that is attached to the patent in your hand, and tell where the beginning place is in that patent?

A. I can by utilizing the ties given in the notes.

Q. Well, let me see you do it; taking for granted that this [1235—1085] Defendant's Exhibit "S" is a correct survey of this patent I have read off to you, where do you say that survey commences?

A. I don't think I can show it very accurately on that map.

Q. Approximately, then.

A. From the ties that are given in the notes?

Q. I don't want any ties given in the field-notes. You said that you know where the Lotta Lode Claim has been located by the decision of Judge Cushman.

A. Yes, sir.

Q. Now, taking for granted that is true, and that is the true location of the Lotta claim, where do you say that beginning point is from the field-notes in the patent?

(Testimony of B. D. Stewart.)

A. As I understand his decision, these two corner posts 5 and 6 mark the corner posts on the ground; and No. 1, according to his decision, would be 150 feet east from that post 6.

Q. Then, this corner here is marked (indicating).

A. However, there is no post there on the ground.

Q. Now, the commencement of that survey would be at a point at what distance from corner post No. 6, on this Defendant's Exhibit "S"?

A. I think the Judge says 150 feet.

Q. Now, then, you know, Mr. Stewart, that commencing at that point and running a certain distance, what is the next course run, considering that is No. 1? A. Same course, I believe.

Q. "Thence, first course, North fifty-six degrees and fifteen minutes east one hundred and fifty feet to a post marked No. 2, U. S. Survey No. 87."

A. You are referring now to these patent notes?

Q. Yes, sir. Now, which way is he running?

A. Northeast; same course as the other.

Q. "To a post marked No. 2, U. S. Survey No. 87. Thence, second course, south thirty-three degrees and forty-five minutes [1236—1086] east one thousand five hundred feet to a post marked No. 3 U. S. Survey No. 87." What course is he running there—is he running on the upper side line of the Lotta, or is he continuing in a northeasterly direction?

A. Running on the upper side line of the Lotta—supposed to be.

Q. "Thence, third course south fifty-six degrees and fifteen minutes west one hundred and fifty feet

(Testimony of B. D. Stewart.)

to a post marked No. 4 U. S. Survey No. 87, three hundred feet to a post marked No. 5 U. S. Survey No. 87." Then that course is supposed to be coming down the southeasterly line of the claim, isn't it?

A. Supposed to be.

Q. "Thence, fourth course, North thirty-three degrees and forty-five minutes west one thousand five hundred feet to a post marked No. 6 U. S. Survey No. 87." That is supposed to go from post No. 5 up to post No. 6, isn't it—in that direction?

A. Yes, sir.

Q. "Thence, fifth course, north fifty-six degrees and fifteen minutes east one hundred and fifty feet to post No. 1, the place of beginning"—that is supposed to get back to the center end line of the Lotta claim, isn't it? A. Supposed to; yes.

Q. "Said lot No. 87, extending one thousand five hundred feet in length along said Lotta vein or lode and containing ten acres and thirty-three hundredths of an acre." Now, commencing the next one—"Beginning for the description of Lot No. 88," which is the Taku Lode Claim, isn't it?

A. Taku Gold and Silver, I believe, is the name of it,—not Taku—Taku Gold and Silver.

Q. Marked on this exhibit "S" as Taku?

A. Yes; but that is not the name in the patent.

Q. This is the same claim, isn't it? [1237—1087]

A. I suppose it is.

Q. Have you made a survey all over that property? A. No; never to find any mining claim.

Q. But you know that the Taku is the same as the

(Testimony of B. D. Stewart.)

Taku Gold and Silver, don't you?

A. I suppose that is what is intended to be represented on that map; I don't know.

Q. Don't you know from your surveys up there that wherever the Lotta may be, the Taku has a common side line with it, up there?

A. Now, that depends on what determines the side line. According to the plat and according to the way the field-notes read, it is intended to have a common side line.

Q. Now, you know that Judge Cushman located the Lotta claim, don't you? A. Yes, sir.

Q. Now, let's take that as true for argument's sake if for nothing else, and let us follow this on up,—“Beginning for the Description of Lot No. 88 at a post marked No. 1. U. S. Survey No. 88, from which a ten-stamp mill bears south forty-nine degrees and thirty minutes east one hundred and forty feet distant”—do you know where that mill is?

A. I know where there is a mill building there; yes.

Q. Then you are running up this line, and then he makes a call to the mill building? A. Yes, sir.

Q. Tied in to the mill building? A. Yes, sir.

Q. That is one tie that is in that group of claims?

A. Yes; it doesn't give any definite point on that mill building.

Q. You can explain that to your attorney, but that is one tie which is just about as definite as any tie you took; the only two ties you took, you came down on the Lotta lode claim and [1238—1088] took a call

(Testimony of B. D. Stewart.)

and commenced some place on the creek? A. I did.

Q. To the bank or the center of the creek?

A. Center of the creek.

Q. Isn't a call to a mill building pretty near as good as a call to the bank of a creek?

A. I don't think it is.

Q. In this case you think that is an exception?

A. I do.

Q. "Thence, first course, north fifty-six degrees and fifteen minutes east one hundred and twenty-seven and eighty-five hundredths feet intersect the southwest boundary line of Lot No. 76B. at North forty-five degrees west one hundred and seventy-four and nine-tenths feet from post No. 1 of said claim, three hundred feet to a post marked No. 2 U. S. Survey No. 88." That is another tie you have with the Webster mill site, which has a common side line with these claims? A. Such a tie as it is.

Q. Don't you think it is a pretty good one?

A. That depends on the position of the claim.

Q. Now, let's go ahead and see if that again intersects that mill site,—“Thence, second course, south thirty-three degrees and forty-five minutes east seventy-nine and three-tenths feet intersect southeast boundary line of said Lot No. 76B at north twenty-two degrees and thirty minutes east one hundred and sixty-six feet from post No. 1 of said claim, eight hundred feet to a point from which tunnel No. 1 bears south nineteen degrees east thirty-five feet distant, and tunnel No. 2 bears south seventy degrees east seventy feet distant one thousand

(Testimony of B. D. Stewart.)

five hundred feet to a post marked No. 3 U. S. Survey No. 88"—do you know where there is any tunnel up there in this neighborhood we are talking [1239—1089] about now?

A. There is a tunnel up there; yes, sir.

Q. Do you see them on this map here?

A. I see it indicated; it isn't indicated as having any number on it; I don't know which tunnel No. 1 is.

Q. Well, taking for granted that the tunnel which is marked on here on the Keystone lode claim on Defendant's "S" is the tunnel that is referred to, that is a tie, isn't it, to a natural object?

A. Yes; that is survey No. 89 tied on survey No. 89.

Q. Is a tunnel anything like a good tie?

A. It has been my experience that some tunnels are very poor ties.

Q. What do you know about this tunnel—have you ever been up to see this tunnel?

A. It is on a very steep hillside, a place where I would say the portal of the tunnel could very easily change?

Q. You have never examined it?

A. I have examined it.

Q. In 1910? A. Yes.

Q. That was the first time you ever examined it?

A. Yes, sir.

Q. You don't know whether it remains in the same condition or not? A. No, sir.

Q. "Thence, third course, south fifty-six degrees and fifteen minutes west three hundred feet to a

(Testimony of B. D. Stewart.)

post marked No. 4 U. S. Survey No. 88, from which a tunnel bears north thirteen degrees west two hundred and thirty-one feet distant, six hundred feet to a post marked No. 5 U. S. Survey No. 88, being also post No. 3 of Lot No. 87, hereinbefore described.”

[1240—1090] Now, you have got another tie in that upper claim above the Lotta to another tunnel, haven't you, and you have got it tied down to one of the stakes of the Lotta, haven't you?

A. It is tied through survey No. 88, yes; a later survey, apparently.

Q. A latter survey—the application for patent all went through at one time, and the survey is all made by one man, isn't it?

A. I understand so; yes, sir.

Q. Now, let's see if we can find any other ties in this survey—“Thence fourth course, north thirty-three degrees and forty-five minutes west one thousand five *hundred to* a post marked No. 6 U. S. Survey No. 88, being also post No. 2 of said Lot No. 87.” Now, the next one after that we have, “Thence, fifth course, north fifty-six degrees and fifteen minutes east three hundred feet to post No. 1, the place of beginning; said Lot No. 88 extending one thousand five hundred feet in length along said Taku Gold and Silver vein or lode, and containing exclusive of the conflict with said Lot No. 76 B, twenty acres and twenty hundredths of an acre.” Now, here is another one, Lot No. 89—“Beginning for the description of Lot No. 89, at a post marked No. 1 U. S. Survey No. 89. Thence, first course, north fifty-six de-

(Testimony of B. D. Stewart.)

degrees and fifteen minutes east one hundred and fifty feet to a post marked No. 2 U. S. Survey No. 89,"—we are going right on up the same direction, are we not, for the Keystone, as these other courses and distances of the Lotta and the Taku?

A. The description is the same.

Q. Going right on up in the same direction, the same number of degrees and the same angle?

A. Same bearing.

Q. "Thence, second course, south thirty-three degrees and forty-five minutes east one thousand five hundred feet to a post marked No. 3 U. S. Survey No. 89. Thence, third course, south [1241—1091] fifty-six degrees and fifteen minutes west one hundred and fifty feet to a post marked No. 4 U. S. Survey No. 89, three hundred feet to a post marked No. 5 U. S. Survey No. 89, being also post No. 3 of Lot No. 88, hereinbefore described"—now, we have tied the Keystone lode, which is No. 89, to the Taku lode, which is survey No. 88, just below the Keystone, isn't it?

A. The notes and the description tie them; yes, sir.

Q. "Thence, fourth course, north thirty-three degrees and forty-five minutes west one thousand four hundred and twenty feet and seven-tenths feet intersect southeast boundary line of said Lot No. 76B"—that is somewhat of a call, isn't it, the same as a call would be the creek—you intersect the side line of another claim, don't you? A. Supposed to.

Q. The field-notes read that you do do it, don't they? A. The field-notes read that you do.

(Testimony of B. D. Stewart.)

Q. That is what I want to know—leave out the suppositions; then that distance is “one thousand five hundred feet to a post marked No. 6 U. S. Survey No. 89, being also post No. 2 of said Lot No. 88,”—there is another common corner of those two lots or claims, is it not? A. From the description.

Q. “Thence, fifth course, north fifty-six degrees and fifteen minutes east one hundred and eighteen and sixty-five hundredths feet intersect south east boundary line of said Lot No. 76B’”—there is another call, isn’t it, the same as the call to the creek on the Lotta—simply a call? A. It is a tie.

Q. We will come to ties afterwards; Mr. Stewart, let me understand you now—do you have any distinction between calls and ties—have you ever made any surveys for cannery sites in this country? [1242—1092] A. No, sir.

Q. Never examined any such surveys?

A. Never did.

Q. Suppose you were making a survey for a cannery site, in the first place you would commence at an initial point and tie it up to some well-known monument, wouldn’t you?

A. I am not acquainted with nonmineral surveys.

Q. You never made any nonmineral surveys at all?

A. No, sir.

Q. You are a mineral surveyor?

A. Mineral surveyor, not a nonmineral surveyor; they are two distinct things.

Q. Say, for instance, you are running a line north 25 degrees, and so on, in a certain way, and say then

(Testimony of B. D. Stewart.)

you strike the corner of a building and then you continue on, you call that a tie, do you?

A. Yes; it would be a tie; I am just as careful in giving those as I am any other tie.

Q. You are just as careful in giving those as you are in the first place in having some initial point to start from? A. Just the same.

Q. Now, don't you know, Mr. Stewart, when you start at an initial point, you tie that up to some well-known monument, natural object, mountain-top, United States survey post that has been established, or tie it up to some post on some patented claim—that is the way you do when you start to get an initial point to start out and survey?

A. You include in your question a tie to a mountain top—I never tied to anything as indefinite as a mountain top.

Q. You wouldn't, but a sharp mountain peak does make a good tie, doesn't it?

A. I never saw a peak that would be sharp enough to tie to it.

Q. You haven't passed through the Surveyor General's office [1243—1093] and examined some of those surveys, have you? A. No.

Q. You wouldn't swear that there are no surveys tied to a mountain peak, would you? A. No.

Q. What you mean by a tie is that you follow a course from a given point, and after you leave that given point you strike a natural object and say that is so many feet away from the place you start?

A. That is one kind of a tie. There are different

(Testimony of B. D. Stewart.)

kinds of ties—ties to objects or things which are off the line entirely, and the other class of ties are ties which are met with in running off the claims.

Q. Then, when we are running along this upper end line of a bunch of claims that are patented together and we strike the end lines of some claim at a certain post, that is a tie?

A. That is an indirect tie, because it is tied through the corner of one claim into another claim; it is not as definite a line as a direct tie would be, meeting with some natural object.

Q. Well, now, let's begin with No. 90: "Beginning for the description of Lot No. 90, at a post marked No. 1 U. S. Survey No. 90. Thence, first course, north fifty-six degrees and fifteen minutes east one hundred and fifty feet intersect west side line of Lot No. 91, hereinafter described, at north thirty-three degrees and forty-five minutes west eight hundred and seventy-eight feet from post No. 5 of said claim, two hundred and twelve feet to a post marked No. 3 U. S. Survey No. 90, from which U. S. Mineral Monument No. 2 bears south sixty-five degrees and thirty-seven minutes east six thousand five hundred and thirty and six-tenths feet distant"—that is another tie, isn't it?

A. Yes; that is another tie, a distant tie—that is a different [1244—1094] class.

Q. There are none of them as good as a creek-bed, are they? A. I don't think so, in this case.

Q. "Thence, second course, south thirty-three degrees and forty-five minutes east eight hundred and

(Testimony of B. D. Stewart.)

seventy-eight feet intersect west side line of Lot No. 91"—that is another tie, isn't it?

A. Yes, that is an indirect tie.

Q. "At north fifty-six degrees and fifteen minutes east sixty-two feet from post No. 5 of said claim, one thousand one hundred and ten and two-tenths feet intersect west side line of Lot No. 92, hereinafter described"—that is another call or tie, isn't it?

A. Yes, sir.

Q. "At south forty-eight degrees and forty-two minutes east two hundred and forty and three-tenths feet from post No. 6 of said claim, one thousand five hundred feet to a post marked No. 3, U. S. Survey No. 90. Thence, third course, south fifty-six degrees and fifteen minutes west two hundred and twelve feet to a post marked No. 4 U. S. Survey No. 90, three hundred and sixty-two feet to a post marked No. 5 U. S. Survey No. 90, being also post No. 3 of Lot No. 89, hereinbefore described." There is another tie tying up this series of claims together, isn't it?

A. From the description; yes.

Q. Now, then, without running through this long description, have you read over these field-notes of this patent sufficiently well to state whether or not that whole group which are patented together are tied up to each other?

A. They are in the description given in the patent; yes, sir.

Q. Well, that is the only place you could tie them up, would be the description in the patent, isn't it?

A. The only place in the notes that you could; yes, sir. [1245—1095]

(Testimony of B. D. Stewart.)

Q. Well, then, I will ask you also if you know anything about the Royal lode claim which is just southeasterly of the Taku lode claim—do you know anything about that survey?

A. I know that such a survey is in existence.

Q. Did you ever take a look at that official survey of the Royal to find out whether or not the end line stake No. 3 of the Lotta is a common end line stake with the Royal?

A. I have examined the posts on the ground and found it was not marked for the Royal; I think the notes do call for the posts to be identical.

Q. And that corner which is identical with the other, what is it tied up to—another tunnel, isn't it?

A. Yes, sir; that is a tie on the Royal.

Q. Did you ever go up the side lines of these surveys in 1910 and find out how many corner posts were on the ground, of these certain mining claims I have called your attention to? A. I did; yes, sir.

Q. Now, let me ask you if you did not find—first, I will ask you to come to this Defendant's Exhibit "S,"—going up this end line of these claims composing this survey, can you tell me what corner posts, if any, you found along that common end line in 1910?

A. I found a post at the point indicated as corner No. 6 of the Lotta—at least, a post in the ground that was supposed to represent that; I wouldn't say that is the post indicated on this map.

Q. That is the corner post by which Judge Cushman decided the lower side line of the Lotta claim,

(Testimony of B. D. Stewart.)

isn't it? A. Yes, sir.

Q. Now, just tell me where you found any posts up there in 1910.

A. At this point marked No. 6 of the Lotta, near where corner 1 is indicated on the map; nothing at where corner No. 2 is indicated; nothing at the common corner of Survey No. 88 and [1246—1096] 89, on that northwest end line; I believe a post at the common corner for surveys 89 and 90; and a post in the vicinity of the place called for by corner No. 2 of Survey No. 90.

Q. Now, I will ask you, from this Defendant's exhibit which I have marked "K-2" for Identification, if that don't appear to be the same sort of a survey of these patented claims, that have been testified concerning, as are on Defendant's Exhibit "S"?

A. I wouldn't want to testify that it is the same kind of a survey, because there are some distances given on this map and there are no distances on this map. (Indicating.)

Q. Let's concede this is the same sort of a survey. Now, after you come up from corner No. 2 of the Lotta, I will ask you if you didn't find a post at the point indicated on Defendant's Exhibit "K-2" for Identification marked in red with the figure 1 in red?

A. Yes; I believe I did find a post there; it was marked for the—

Q. I am not asking you how it was marked—I am asking what corner posts you found.

A. Yes; there was a corner post there.

Q. There is a post marked in red on the upper end-

(Testimony of B. D. Stewart.)

line of this group of claims, with the figure 2 on one side and the figure 6 on the other—did you find that there?

A. That is one that I have already indicated.

Q. And come still further up—did you find on the same line, at the same angle, another corner post marked in red and the figure 2 in red just above it?

A. Now, you say at the same angle—I don't want to answer that it was the same angle—

Q. Same angle on this Defendant's Exhibit "K-2"?

A. At the same angle with what? [1247—1097]

Q. At the same angle, a continuation of the upper end line of the Taku lode, the Keystone lode and the Lotta lode?

A. Not on the same line; those corners are not on the same line.

Q. How many feet are they off?

A. A few feet; I don't remember exactly how much it is.

Q. Did you find anywhere in the neighborhood of this corner post No. 2 marked in red, any post?

A. Yes; I have already indicated in my other answer that was one of the posts I found.

Q. Did you ever go on to the adjoining claims, the Humboldt group, which adjoins this group on the west, to see whether there were any corners in there that tied in with any corners of this group of claims?

A. I was over there but didn't find any posts that tied in to these claims.

Q. Did you find any posts in there at all?

(Testimony of B. D. Stewart.)

A. I did find some posts; yes.

Q. Did you find any posts over there?

A. I did; yes, sir; several of them.

Q. Can you mention some of them—on what claims you found them?

A. Yes, sir; on the mill site lode I found some.

Q. That is the Webster mill site?

A. No; mill site, Survey No. 383; the Ropeway, Survey No. 545.

Q. Did you find any on the Webster mill site?

A. Yes; some on the Webster mill site.

Q. But, when you were making a location, as you claimed you made, of the Lotta, you used just the data that Mr. Hellenthal asked you about this morning, didn't you? You said that the distance from certain corners of the Lotta down to a call where a certain side-line would cross the creek should be so much, and therefore that there was a difference in the distance as indicated in the patent from what you [1248—1098] found on the ground, and you took and located the Lotta lode claim just with reference to where those lines might cross the creek, as called for in the patent?

A. I located them according to the way those lines crossed the creek.

Q. Well, now, Mr. Stewart, suppose you were sent up there by an investor, as a surveyor, to go up there to located a claim,—would you just go and take that claim, especially when it is included in the patent with a whole lot of other claims—would you just go up there and single out one of the lots of that survey

(Testimony of B. D. Stewart.)

and take some distances of certain corners to where those lines projected from those corners would cross the creek, according to field-notes, and then say you had finished your task and made an honest effort to locate this mining claim? Now, do you say the way you testified to Mr. Hellenthal this morning the way you located that Lotta claim, do you say it would be a fair, honest way for any surveyor to locate a claim, if he was honestly trying to place it on the ground? A. Yes; I would, Judge.

Q. You would say it was? A. Yes.

Q. You would not, as an honest surveyor take into consideration any of the corner posts that you say were on the ground in 1910?

A. I would not take them into consideration as I found all of them on the ground—I would judge of them as to their character by their appearance.

Q. That is, if they did not technically comply in your mind with what a survey stake ought to be,—seemed a little new or something odd about them, you would not take those posts into consideration at all, would you? [1249—1099]

A. I would not take them into consideration if I did not think there was sufficient evidence to show that they were the original posts in their original position; I would certainly go by the calls in the notes and interpret them the best I could.

Q. You wouldn't go up the common end line of the Keystone and the Crown Point to see if there were any common lines or where it ties into the Lotta claim, would you?

(Testimony of B. D. Stewart.)

A. I did do that, Judge, and found that the ties—

Q. Did you tell Mr. Hellenthal that you did do that? A. He didn't ask me.

Q. Didn't you tell Mr. Hellenthal this morning in answer to his question—he gave you just the field-notes of the Lotta claim and segregated them from the other field-notes in this patent, and didn't you give your answer directed upon that, and that alone?

A. That is the way he asked me the question.

Q. And then when I brought it to you again and asked you to point out in this patent just what was your criterion to go by, didn't you point out the description on page 1772?

A. Yes, sir; because that was in answer to his question, which included only that one description.

Q. What time did you say you made this attempt to locate the Lotta claim?

A. You mean the first time?

Q. Yes, sir. A. In November, 1910.

Q. You testified to these identical same matters in the trial before Judge Cushman, of the Basin case, didn't you? A. I believe so.

Q. And you had a map there in that case where you slid the Lotta up and down the creek and you gave it a different [1250—1100] location, didn't you?

A. No, I didn't, Judge; I gave it but one location there.

Q. You know Judge Cushman found against you on the proposed location, don't you?

(Not answered because of objection.)

(Testimony of B. D. Stewart.)

Q. Now, that survey was made for the purpose of the trial of that case before Judge Cushman, wasn't it?

A. As I understand it, it was made to exhibit the defendant's claims in that vicinity.

Q. It was made for that purpose alone, wasn't it—didn't you make it only for the purposes of that trial? A. That is all.

Q. Now, then, Mr. Stewart, you said when you were up there in 1910 you found some brush cleared out on the lower side line of the Lotta claim?

A. I don't believe I have testified to that yet.

Q. Didn't you testify to Mr. Hellenthal and say that the dam was in a certain relation to the cut outline?

A. I don't think he asked me about a cut outline; I think he asked me about a line from the two posts.

Q. I think you testified this morning that when you were up there in 1910 you observed the brushed out line on the lower side line of the Lotta?

A. I don't recall that I testified to that, but I did observe such a line more or less brushed out.

Q. And you can see that line up there now, can't you?

A. Yes; it is quite distinct because it has been brushed out since.

Q. Since 1910?

A. Yes, it has been brushed out recently—cleared out.

Q. How long ago?

A. I don't know. [1251—1101]

(Testimony of B. D. Stewart.)

Q. About how long ago? A. I don't know.

Q. When did you see it last?

A. The last time I was up there was on the 2d of August, and I was there on the 1st.

Q. You think some of it has been cleared out this year? A. Yes, sir.

Q. Now, then, prior to any clearing that has been done this year, you could see that lower side line of the Lotta across the creek distinctly, couldn't you? A. Yes, I have seen it before.

Q. Now, how do you say you made your survey to ascertain as to whether or not any of the Alaska-Juneau's dam was originally constructed—when did you make that survey?

A. I made that in 1910—November, 1910.

Q. And what part of the dam did you say you found on the Lotta claim?

A. It was an embankment of earth on the northwest end.

Q. Did you make that survey before Judge Cushman tried the case? A. I did; yes, sir.

Q. And you testified, I think, in Judge Cushman's court, didn't you? A. I did, yes, sir.

Q. Do you say now that the way the dam is now constructed, that there has never been any change made in it?

A. I don't say that; no, sir; I have just testified that as far as I can observe that the northwest end of the dam has been swung down the creek several feet.

Q. The northwest end—you mean the end on the

(Testimony of B. D. Stewart.)

left-hand side of the creek as you go up?

A. Yes, sir. [1252—1102]

Q. Did you ever measure to see how far that was swung down the creek?

A. No, because the point I measured from originally is gone.

Q. So you couldn't say how many feet it was swung down the creek?

A. No, not exactly; I have never measured it.

Q. Do you testify that the intake of the flume is the same now as it was before that case was tried before Judge Cushman? A. Yes, sir.

Q. Now, if they swung the end of the dam that is on the left-hand bank of the creek as you go up the creek, did the remaining part of the dam remain the same, or would it be swung accordingly?

A. As far as my observations have extended, I would say that there was one-third to one-half of it that was the same; that is, from the intake to somewhere near the center of the creek; then there has been a bend made in the dam and it has been swung down to the northwest end of the creek.

Q. Did you ever go up there before that case was tried before Judge Cushman, to ascertain what part of the dam was on the Lotta claim? A. I did.

Q. There was some part of it on the Lotta claim, wasn't there?

A. There was, as I have testified, just this embankment.

Q. Now, Mr. Stewart, supposing we take these two pencils and lay them parallel to each other, and

(Testimony of B. D. Stewart.)

say between these two pencils it represents the bed of the creek, and one pencil represents the right-hand bank as you go up the creek and the other the left-hand; I will ask you if originally the dam wasn't constructed somewhat diagonally across the creek from one of these banks to the other? [1253—1103] A. Yes, sir.

Q. Now, then, in what way was it changed—the part of the dam which is on the left-hand side represented by the red pencil, they swung that down the creek?

A. Yes, on the left-hand side going up the creek.

Q. And you don't know whether that left the right-hand side of the dam, on the right-hand side of the creek, remaining the same, or whether they moved that too?

A. I don't know whether they moved any of it; I know from my survey the dam is still off the line.

Q. Don't you know that they swung that part of the dam which is on the left-hand side of the creek down the creek and that threw the part of the dam on the right-hand side of the creek over the line of the Lotta? A. No, I don't know that.

Q. Don't you know that that dam don't extend clear across the creek?

A. It is in the shape of a V, with the apex up the stream, and the apex is somewhere near the center of the stream.

Q. The dam is in the shape of a what?

A. V, and the apex is up the stream.

Q. Is that the way you build a dam to sheer some

(Testimony of B. D. Stewart.)

of the water out of the flume?

A. That is the way this is built.

Q. It will sheer some of the water off of the flume?

A. Established a spillway to take off the water.

Q. This is on the left-hand side of the creek as you go up? A. It is the northwest—

Q. The spillway is near the left-hand bank of the creek as you go up—on that side of the creek?

A. Yes, sir.

Q. And your intake is over near the right-hand side of the creek? [1254—1104]

A. That is correct.

Q. And the flume itself does not come up flush with the dam, does it?

A. The intake of the flume does, yes.

Q. About how wide is that intake there?

A. I never measured the intake. Just from my recollection, it is six or seven feet wide; something like that—eight, maybe.

Q. Are there any cross timbers in that dam?

A. Not that I know of.

Q. Were there any there when you were there the first time?

A. The dam was there when I was there the first time.

Q. You were not present when it was built?

A. No, it was built when I was there.

Q. What I mean by timbers is timbers that go across the creek, and constitute your dam, and would be tied in between those logs, and extend back up the creek so as to hold the dam in place?

(Testimony of B. D. Stewart.)

A. I don't know how the dam is built; I wasn't there when it was being built.

Q. You wouldn't say that is not the way it is built?

A. I wouldn't say; no, sir; I don't know how it is built.

Q. Now, you would not swear that there are not some of the timbers that constitute a part of that dam still on the Lotta claim, would you?

A. As far as I was able to see, they are not; that is all that I can testify to, is what I can see.

Q. Of course, if there were any cross-timbers in there extending back up the creek, up 15 or 20 feet, or something like that, these cross-timbers might be on the Lotta claim?

A. They might be if they were there.

Q. Did you make an actual survey to ascertain whether or not there was any part of the dam on the Lotta claim, excepting the cross timbers?
[1255—1105]

A. I did; I sighted up from post No. 5 as on the ground to No. 6 as in view, and went down that line between the two to observe what I could see there, and as far as I could see the dam was off of that line.

Q. That is the means you took to ascertain it?

A. It was; yes, sir.

Judge WINN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Stewart, you actually ran out that line,

(Testimony of B. D. Stewart.)

did you not? A. I did; yes, sir.

Q. And from the information that you obtained by running that line, are you able to testify as to whether or not any part of the dam is across the line of the Lotta?

A. I couldn't testify that there was any of it on the Lotta at all; from my observations the dam was off the Lotta, the structure of the dam.

Q. The entire dam?

A. As far as I could determine.

Q. If there had been a part of the dam sticking over on the Lotta you would have seen it?

A. If there was any of it visible I could have seen it.

Q. Was there any visible part of the dam over on the Lotta side?

A. Not at the time I made my survey.

Q. When was that?

A. That was *one* the 1st of August of this year.

Q. Did you examine the field-notes in Judge Cushman's decree—the field-notes of the Lotta?

A. Yes, sir. [1256—1106]

Q. Are those the same as the field-notes given in the patent? A. They are different.

Q. The claim described by Judge Cushman in his decree is not the claim described in the patent?

A. It is not the same description.

Q. Judge Winn has been interrogating you in regard to an exhibit called Defendant's Exhibit "S"; do you know whether that exhibit plats the claim as described in Judge Cushman's decree or as described in the patent?

(Testimony of B. D. Stewart.)

A. Well, I couldn't say without a little closer examination of the map; there are no courses or distances on it.

Q. There are no courses or distances on it?

A. There are no courses or distances given on it, but I could tell by scaling it.

Q. Judge Winn has asked you to go from post to post and stake to stake, and has asked you if that wasn't the patent description—what have you to say about that, Mr. Stewart, whether that map follows the patent description?

A. I cannot tell whether it follows the patent description or not; as I say there are no courses or distances on it.

Q. You haven't scaled it? A. No.

Q. You don't mean to testify that that map is in accordance with the patent description?

A. Not at all.

Q. Or in accordance with any other description?

A. No, sir.

Q. You testified, I think, in response to Judge Winn's question that you had surveyed and tied in all those stakes as found on the ground and referred to as stakes of the Crown Point, Taku Gold and Silver, and all those various claims [1257—1107] above the Lotta. A. I have.

Q. Also of the various tunnels and other things referred to? A. I have; yes.

Q. Did those stakes or anyone of them, as you found them upon the ground occupy the positions called for by the patent description?

(Testimony of B. D. Stewart.)

A. Not one of them occupied such position.

Q. Did any one of those stakes occupy the relative position to any of the other stakes called for in the patent? A. They did not; no.

Q. If you were to assume that any one of those stakes was one of the stakes called for in the patent, would any one of the other stakes be found to occupy the correct position? A. No, sir.

Q. Now, speaking with reference to the tunnel, ties, and the tie to the mill, did any one or all of those ties occupy the position with reference to the stakes found on the ground that they should occupy if placed there in accordance with the patent description? A. No, sir.

Q. Did you use any or all or either of them?

A. None.

Q. A tie to a mill or tunnel where there is any other tie except a mill or a tunnel given, is about as definite as a tie to the top of a mountain, isn't it, Mr. Stewart? A. I consider it so; yes, sir.

Q. Judge Winn has asked you why you, in locating the Lotta claim upon the ground, observed the ties to Gold Creek and located the claims with reference to those ties—I wish you would explain that to the Court?

A. I located it that way from those ties because, considering [1258—1108] we are trying to locate the Lotta claim, that creek traverses the side and end lines of the Lotta claim; the notes tell how far from the various corners those creek intersections are upon the ground; I found that the stream in this

(Testimony of B. D. Stewart.)

case has a rock channel, and apparently is not subject to any change, and is therefore definite and indestructible. The tie to a mill is an indefinite thing; there is no particular point on the mill to tie to in this case, and it doesn't say whether it is one corner or another, or what part of the mill it is tied to; furthermore, a mill is a destructible thing, and a thing that will change in passing years. The same thing with regard to a tunnel; my experience with tunnels has been that in many cases they are extremely unreliable as ties, due to the operations which are carried on, and in some cases due to slides; also tunnels are subject to caving in at the portal or at the face, and in case of caving at the face the length of the tunnel would be altered, and it would not fit the description, and in case of any other work done on the tunnel it would not fit the description; and in a steep country like this, where the mountain sides are subject to slides, a tunnel is a very unreliable tie. I know of cases where tunnels are called for in patents where the tunnels have been obliterated by the movements of the ground; and a tunnel then might be driven in that immediate vicinity, and might be mistaken for the tunnel that they were originally tied to,—I have known of that to happen.

Q. In any event, neither of these stakes is in the right position, if tied to a mill or tunnel or any other object, as you observed them?

A. They do not check. [1259—1109]

Q. Now, what is the reliability of a stake found in the ground as compared to a tie to a natural object, such as the creek?

(Testimony of B. D. Stewart.)

(Not answered because of objection.)

Q. Now, Mr. Stewart, I think that you said you found those stakes concerning which Judge Winn has been asking you along the end line of the various claims as they laid upon the ground?

A. Yes; I found posts practically in the position he indicated, as near as I could pick out from the map.

Q. Is the course given along there so you could find those stakes—they are all put in a straight line, aren't they? A. Fairly straight line.

Q. Does that straight line follow the same course as the end lines of these claims follow as given in the patent? A. No, sir.

Q. If those are the correct stakes, then the patent is wrong?

A. Decidedly, by two degrees, or something like that.

Q. Do they fit or tie to any mineral monument?

A. They do not, not by a considerable.

Q. Is there anything you know of that they do fit?

A. No.

Mr. HELLENTHAL.—That is all.

Recross-examination.

(By Judge WINN.)

Q. It is all wrong, is it, Mr. Stewart?

A. According to those posts in the ground, it is all wrong.

Q. And you went up there for the purpose of showing that it is all wrong?

A. I found what the posts showed; yes. [1260—1110]

(Testimony of B. D. Stewart.)

Q. You went up there under these instructions that it was material to show that everything was wrong, didn't you? A. By no means.

Q. Now, I will ask you—you say they are off two degrees; now, of you take Garside's courses, or the angles that he runs those lines on and then take his variations, you would approximately run those lines just in the same place they are of you take your variations and take the angles which you run them, wouldn't you—did you ever test that?

A. I don't know that I did; you mean the angles as they are indicated on the ground, of the posts, how they would compare with the angles as shown in the description.

Q. Mean this, you know what variation those lines are run on in the patent?

A. I know what the variation of the patent calls for.

Q. That is what I mean?

A. Yes, sir; I know what it is.

Q. Then, taking Garside's variations and Garside's angles as he turned them in for the Lotta lode claim, I want to know if you would not meet with the same results as if you took your variations and your angles which you ran around that claim?

A. Now, you speak of angles; I don't know what you mean by angles; do you mean the bearing with reference to the true meridian?

Q. Yes, sir; I mean turning the angles at the corner posts the way Garside did?

A. Oh, no, sir; you would have to turn your angle

(Testimony of B. D. Stewart.)

from some definite corner.

Q. Where did Garside commence to make his survey?

A. I think, according to Judge Cushman's decision, it was from a point 150 feet from corner No. 6, northwesterly.

Q. Do you remember what course he then ran from No. 6? [1261—1111]

A. I believe it is north 56—15.

Q. What variation? A. Thirty degrees.

Q. That isn't the true variation, is it?

A. No, I don't suppose it is.

Q. What variation do you run that course at?

A. At the present time about 32°, a little more than that.

Q. What course did you take from the initial point there to run up to the next corner—what would be your course?

A. Running, you mean, according to the present—

Q. Running according to the present outside boundary line of the Lotta claim?

A. If I understand you, Judge, I am to start at the magnetic meridian, and run off on a course that is called for in the patent?

Q. Yes, take the variation, at what it actually is, not what Garside had the variation at, and run between the corner post at which Judge Cushman's decision commences at, and run along that line in the direction that Judge Cushman established—what would be your course between those two points?

A. Well, if I used the magnetic meridian at this

(Testimony of B. D. Stewart.)

time and followed it out, it would run on a true course N. 57—24 N. E., and it would show a variation or declination of 32°.

Q. That would be the course on a variation of 32° that it would run; Garside's variation was what?

A. Thirty degrees.

Q. How would his course run? A. 56—15.

Q. Now, you talk about the general unreliability of a mill and a tunnel as a tie for courses. Now, Mr. Stewart, suppose you are making a survey of a mineral claim and in the course of making your survey you tie up to the portal of some tunnel [1262—1112] then if you come back in five or ten years and find that the portal of that tunnel has not changed any, then it would be a pretty good reliable tie, wouldn't it? A. Yes, it would.

Q. And you say buildings are apt to fall down or blow over—if the Ebner mill was up there at the time this survey was made, and has remained in the same place, and the call was established from the course they were running on, that would be somewhat of a reliable call, would it not?

A. It would, with reference to that, yes.

Q. Now, did you ever measure the distance, Mr. Stewart, along down the upper side line of the Crown Point, the Keystone, the Taku and the Lotta, to find out whether the distances between the posts that were set there is the same, or is it materially changed on the ground from what it is in the patent—It is pretty near the same isn't it?

(Testimony of B. D. Stewart.)

A. Between those posts that do exist on the ground, yes.

Q. Now, you say that you found all these things wrong from the field-notes in the patent; how far off, according to your idea, are any of those corner posts wrong—you told me two or three feet, some of them, didn't you?

A. I don't think I specified that.

Q. Twenty feet?

A. No, I didn't specify any feet.

Q. Well, how many feet is it off?

A. I wouldn't say from memory; I would rather examine my notes.

Q. Not very far, is it?

A. Not very far off; I think I testified that they were substantially on the line—on a line with one another; that is, those posts that are in there now.

Q. You mean to say those that were in there in 1910? A. Yes, sir.

(WITNESS EXCUSED.) [1263—1113]

The plaintiff, to further maintain the issues on its part, recalled as a witness in rebuttal R. G. WAYLAND, who having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

**Testimony of R. G. Wayland, for Plaintiff
(Recalled in Rebuttal).**

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is R. G. Wayland? A. Yes, sir.

(Testimony of R. G. Wayland.)

Q. You have already been sworn? A. Yes, sir.

Q. Were you in the employ of the Alaska-Juneau Company in the year of 1910? A. Yes.

Q. At the time this water location was posted?

A. Yes.

Q. Do you know the map in the office of the Alaska-Juneau Gold Mining Company on which is shown these various claims, the Lotta and the surrounding claims? A. Yes.

Q. Are you familiar with that map? A. Yes.

Q. How is that map made up, referring to the map from which you and Mr. Kinzie located the point at which to locate the Mulligan notice—how are the claims placed upon that map?

A. They are compiled from the records in the Surveyor General's office.

Q. How is the Lotta claim platted on that map?

A. From the official notes.

Q. On that map was the mill building situated on the Lotta claim shown? [1264—1114]

A. It was.

Q. And how was the creek shown on that map?

A. As shown on the official plat.

Q. Do you know the position of the Lotta lower side line on the ground, as surveyed upon the ground with relation to the Colorado and Idaho placer as shown upon that map and in accordance with the official notes of these various surveys as shown in the Surveyor General's office?

(Question not answered because of objection and demand made for production of map.)

(Testimony of R. G. Wayland.)

Q. I wish, Mr. Wayland, when you go home to-night you would look the map over and see if there is anything on the map which contains private information that you do not want to make public, and if not will you bring the map over in the morning? I call your attention to a map received in evidence as Plaintiff's Exhibit No. 1, and call your attention especially to the buildings shown thereon and marked here as the "New Ebner Mill and Excavation for Enlargement"—are you familiar with that building?

A. I am.

Q. Are you also familiar with the excavation?

A. Yes, sir.

Q. Mr. Wayland, did you see an excavation there?

A. Yes.

Q. Is there an excavation there? A. There is.

Q. Did you measure that excavation? A. I did.

Q. How large is it?

A. It is about 45 x 65 feet.

Q. 45 x 65? A. Yes. [1265—1115]

Q. Now, Mr. Wayland, are you familiar with the Alaska-Juneau dam as it is now on the ground?

A. I am.

Q. I am speaking of the dam near Snow Slide gulch that is in controversy in this case?

A. Yes, sir.

Q. Do you know where the lower side line of the Lotta is, as it is marked by stakes at corners Nos. 5 and 6? A. I do.

Q. Where is that dam at present, as it is now on the ground, with reference to the line marked by those

(Testimony of R. G. Wayland.)

two posts, 5 and 6? A. Below the line.

Q. The entire dam? A. The entire dam.

Q. Is there any part of it projecting over across the line? A. No, sir.

Q. Do you know where that dam was when it was first constructed in October, 1910? A. I do.

Q. Where was it at the time with reference to where it now is? First, I will ask you where was it with reference to the lower side line of the Lotta as marked upon the ground by these stakes 5 and 6?

(Question objected to and asked again.)

Q. Now, Mr. Wayland, will you please tell the Court what part of the dam as first constructed was on the Lotta claim, as the claim is presumed to be defined by the stakes that occur at corner No. 5 and corner No. 6 on the ground?

A. That portion at the end of the timbers, the part of the dam to the northwest, over on the left-hand bank of the creek [1266—1116] going up stream, that portion consisting of brush and rock and earth.

Q. No part of the timbers were on the Lotta—was any part of the timber structure of the dam on the Lotta? A. I believe not.

Q. Since then what change has been made in the dam structure?

A. The part of the dam that was composed of brush and earth and rock was removed, and another wing built from a point at the end of the old timber dam across the creek below the side line of the Lotta and diverging from it. This new part was built below the side line of the Lotta.

(Testimony of R. G. Wayland.)

Q. And that is the position the dam now occupies?

A. It is.

Q. The intake, was that ever changed? A. No.

Q. Mr. Wayland, these lines, the southerly side line of the Lotta in its relative position with reference to the dam at the various points that you have testified, were they determined by you by actual surveys upon the ground, or otherwise?

A. By actual surveys upon the ground.

Q. By actual surveys upon the ground made by yourself? A. Yes.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. When did you first make any survey of the ground to ascertain what you have been testifying concerning?

A. I don't remember when I first did.

Mr. HELLENTHAL.—Just a moment,—let me ask Mr. Wayland another question.

Q. Did you ever do any surveying, Mr. Wayland, to determine the [1267—1117] position of the lower side line of the Lotta on the ground?

A. I did.

Q. Did you find any tunnels on the Taku Gold and Silver at that time?

A. I found some tunnels; yes, sir.

Q. How many tunnels?

A. I found three or four.

Q. Were any of those tunnels in such a position on the ground that they would answer the call of the

(Testimony of R. G. Wayland.)

patent for a tunnel, having in mind that one of the stakes that it tied to was in the correct position on the ground?

(Objection.)

Q. You found stake No. 3 marked for corner No. 3 on the ground? A. Yes, sir.

Q. And also the stake of the Taku Gold and Silver which is supposed to tie to one of those tunnels as described in the patent?

A. I didn't find that stake, no; I was tying it to the line of the Taku Gold and Silver to some of the corners that are reported to be the corners of the Lotta.

Q. Did any of the corners of the Lotta to which you tied the tunnels from the corners given to the patent occupy such a position on the ground that you could adopt any one of those tunnels as the tunnels referred to in the patent?

A. No, sir; it did not.

Mr. HELLENTHAL.—That is all.

Cross-examination (Cont'd).

(By Judge WINN.)

Q. When did you make that survey? [1268—1118]

A. The 12th of October, 1910.

Q. October 12th, 1910? A. Yes, sir.

Q. What was your purpose in making that survey?

A. To see if it was so that the lower side line of the Lotta could be where they claimed, to see where it would be if that tie was followed out.

Q. That is when you were making a survey to as-

(Testimony of R. G. Wayland.)

certain whether or not your dam which you had built was on the Lotta claim?

A. To see whether that lower side line of the Lotta as claimed by the Ebner Company would fit in with that tie.

Q. You didn't make that survey until the 12th of October, 1910?

A. I didn't make that tie until the 12th of October, 1910.

Q. Was that after you had built your dam?

A. That was after the dam was built.

Q. What ties did you find there?

A. I couldn't find any tunnel that would answer the description in any way—no tunnel that I could have adopted to tie in.

Q. Referring to Defendant's Exhibit "S," the tunnel that you were trying to find is the tunnel that is marked "Tunnel" on the Keystone Lode Claim on this exhibit—did you find a tunnel up there?

A. Found a tunnel in there somewhere; yes, sir.

Q. When you ran down the lower side line of the Keystone Lode Claim, you knew that in the patent field-notes there was a call made to a tunnel, didn't you? A. Yes.

Q. Do you know what course that tunnel bears from the side line of the Keystone, from where the call was made to it?

A. I don't remember, no.

Q. You don't remember that at all?

A. No; I do not. [1269—1119]

Q. Do you know what the distance is in the patent

(Testimony of R. G. Wayland.)

from the call on the lower side line of the Keystone to the tunnel? A. I don't remember now; no.

Q. Do you remember what the length of the tunnel is as given in the field-notes?

A. I don't remember now; no.

Q. You remember what description is given in the field-notes of the tunnel to which this call is made?

A. The description in the field-notes has escaped me now—I don't remember.

Q. You don't know how far you found it to be off?

A. I know I didn't find anything that would answer the description at all.

Q. Answer what description?

A. In the field-notes.

Q. Well, I will give you the field-notes and let you see how it differs. Here is the patent (handing paper to witness)—I wish you would take that and tell what you found when you were up there, Mr. Wayland?

A. I didn't find either the bearings or the distances to the tunnel.

Q. What difference did you find, Mr. Wayland?

A. I don't remember, but it wasn't very close.

Q. What do you mean by not very close?

A. It was 40 or 50 feet out as near as I can remember; I don't like to give the figures.

Q. You didn't bring your figures with you, did you? A. No, sir.

Q. You made that survey after your dam was all in? A. Yes, sir.

Q. Now, then, that dam was originally built diag-

(Testimony of R. G. Wayland.)

onally across the [1270—1120] creek, wasn't it?

A. It was.

Q. And you know all that part of the dam from the intake over to the left-hand bank of the creek going up the creek you found to be on the Lotta claim, didn't you?

A. I said I found none of it on the Lotta claim from the intake to the end of the timber dam—I didn't say I found any of it on the Lotta claim.

Q. The intake is on the right-hand side of the creek as you go up, isn't it? A. Yes, sir.

Q. There isn't any timber between your intake and the right-hand bank of the creek, is there?

A. No.

Q. That is cut through there in rock, isn't it?

A. Yes, sir.

Q. The timber part of the dam, then, extends across from the intake to the left-hand bank of the creek as you go up?

A. At that time it extended from the intake to two large logs in the center of the creek, where it entered; and that part of the dam was not on the Lotta; the remaining part of the dam, which consisted of brush and rock and earth, was partly on the Lotta and partly off the Lotta.

Q. That was a part of your dam, wasn't it?

A. That was a part of it; yes, sir.

Q. How long was that part of your dam from the big log over to the side of the creek?

A. Probably 15 feet long.

Q. You used that as a part of the dam—that

(Testimony of R. G. Wayland.)

sheered the water off down to your intake?

A. The embankment to form an approach to the dam. [1271—1121]

Q. How many feet above the lower side line of the Lotta was the dam, that was on the Lotta,—that is, I mean taking the longest part—taking from the side line over on the left-hand side of the creek and going up the creek, how far would that be on the Lotta claim?

A. The way I remember, from three to six feet.

Q. You don't remember that? A. Yes.

Q. Did you make any actual measurements of it, Mr. Wayland?

A. I measured the timber part and sketched in the embankment.

Q. You haven't that sketch with the figures with you, have you? A. No.

Q. Now, after Judge Cushman's decision, what did you say you did with that part of it?

A. There was a long dam put in the creek from the point where the timbers ended in the old dam to the left-hand bank going up the creek.

Q. Then, you have to make kind of a turn there—you would turn an angle in the creek?

A. Yes, sir.

Q. Is that angle turned in the middle of the creek?

A. Yes.

Q. Is that the way your dam is constructed now?

A. Yes, sir.

Q. Part of that dam would lead your water away from the intake and a part of it leads it in, doesn't it?

(Testimony of R. G. Wayland.)

A. When the water gets high enough, the water will go right over part of that dam; but if there is no surplus water, all of the water goes into the intake.

Q. I thought you said that apex was in the middle of the creek?

A. It is in the middle of the creek, but the elevation is such that the water cannot flow over it until it reaches the [1272—1122] highest elevation of the intake of the flume.

Q. Now, don't you know, as a matter of fact, that the change you made up there, Mr. Wayland, was that that dam originally was built diagonally across the creek—we will represent the banks of the creek with these two pencils in this manner (indicating), and that after the decision of Judge Cushman you took and pushed it down this way (indicating) on the left-hand bank going up, and that shoved the part of the dam that was on the right-hand bank going up, up the creek some?

A. No, that is not so.

Q. Now, don't you know that is true, and that portion of the dam now that you shoved up the creek on the right-hand bank going up is still on the Lotta claim?

A. I believe not—I am pretty sure it is not.

Q. You are not emphatically sure of it, are you, Mr. Wayland?

A. Yes; in a way, yes, I am sure of it.

Q. Did you ever measure it to see if it was on the Lotta claim? A. Yes.

(Testimony of R. G. Wayland.)

Q. How did you measure it?

A. By setting up an instrument in the bottom of the creek on the line and taking a shot at the apex of the dam, it threw it below the lower side line of the Lotta.

Q. Were you down in the bed of the creek?

A. Yes, sir.

Q. When did you do that? A. July 29th.

Q. Of this year? A. This year.

Q. When you are down there in the bed of the creek there at that point, what can you do with an instrument to determine [1273—1123] whether or not you are above or below the line?

A. Why, simply run a line down there and sight up over the line defined by corners 5 and 6; I sighted up on corner No. 5 and sighted on corner No. 6, and surveyed on down to the bottom of the creek, and set up an instrument, and it was about 30 feet from the apex; I sighted from the apex or angle and found that the apex was below the side line of the Lotta.

Q. Don't you know that the creek is so precipitous that you cannot get down in the bed with an instrument? A. I know it is not.

Q. Where your dam is built? A. Yes, sir.

Q. The banks are almost straight up and down, aren't they? A. No, they are not so bad.

Q. Have you got any cross timbers in that dam?

A. No; not that I know of.

Q. Did you help build the dam? A. I did not.

Q. It is banked up on the upper end—the sand has gathered behind it?

(Testimony of R. G. Wayland.)

A. The old part or the new part of the dam?

Q. I mean the dam.

A. It is not banked up behind the old part.

Q. What do you mean by the old part?

A. The part that remains as it was built at first.

Q. Is it banked up behind the new part?

A. It is banked up behind the new part; yes, sir.

Q. Do you know whether or not there are any cross timbers to hold that dam in place?

A. I am sure there are not any in evidence.

Q. How do you brace your dam?

A. It is braced in the rock, wedged in. [1274—

1124]

Q. No cross timbers in the dam at all?

A. There are none apparent.

Q. Will you be positive about that?

A. If there are any, they are pretty well hidden.

Q. Have you been around the dam and looked in to see if there were any cross timbers?

A. I have been around the bank and looked in.

Q. When did you do that? A. The same day.

Q. Last July? A. Yes; about a week ago.

Q. Now, I will ask you if on the left-hand bank going up the creek, in that dam there is not at least one log that is not between the rocks that constitutes the dam, and if that cross log doesn't extent across the creek?

A. I don't know that there is; I didn't see it if there is any.

Q. You wouldn't swear positively that there is not one, would you, Mr. Wayland?

(Testimony of R. G. Wayland.)

A. I didn't burrow down to see, but I don't think there is.

Q. Did you have the patent field-notes with you when you undertook to run that line across on the lower side of the Keystone Lode claim in order to ascertain about that tie to the tunnel that I questioned you about a while ago?

A. I had an abstract from that.

Q. Did you make any effort to find the tie to the mill at that time? A. We tied to the mill.

Q. That tied in pretty close, didn't it?

A. If you choose your point on the mill, you could tie it in pretty close, but there is nothing on the mill to tie to.

Q. How far is that mill from the point on the course from which [1275—1125] the tie is made?

A. I don't remember.

Q. How many feet do you think?

A. Apparently 150 feet, from the map.

Q. You never measured it?

A. I didn't go down into the corner.

Q. You know that that bunch of claims which is included in the patent are all included in one patent and surved in one survey, don't you?

A. They are all in one patent, but they are in seven surveys.

Q. I know, Mr. Wayland, but let us get at it now—don't you know that you commenced at corner No. 1 in that patent, being the upper end line of the Lotta Lode claim; don't you know that you take the patent field-notes and you run clear around up the end line

(Testimony of R. G. Wayland.)

of the Taku and the Keystone Lodes and the Crown Point Lode, and you run the same course all the way up, don't you, in the field-notes?

A. In the field-notes; yes, sir.

Q. Now, when you were trying to make this location, did you attempt to run up these end lines that I have just mentioned and undertake to find all the corner stakes and the ties that were made, in order to locate this Lotta claim? A. No.

Q. That would seem to be the natural way to do it if you were trying to make a survey to get an absolute location of it, wouldn't it? A. I was trying—

Q. I don't care what you were trying to do—you are a surveyor—if you were going up to make an examination to determine where a certain lode claim was located, you being unbiased in the matter, you would go and look for all of the corner [1276—1126] posts that you could find, wouldn't you?

A. Yes, sir.

Q. And in this case, where they were surveyed in a bunch and they run up a common end line like I have indicated to you, and they have a different side line, different end line and make different ties, if you found three or four stakes on the Lotta claim which were marked "Survey 87," which is the survey of the lode claim, and a tie to the mill, you would use all those matters in ascertaining the true location of the lode claim, wouldn't you?

A. I would take into consideration everything that I could find; yes.

Judge WINN.—That is all.

(Testimony of R. G. Wayland.)

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. If, however, Mr. Wayland, you were a surveyor entirely independent and unbiased, and you went upon the ground and found a lot of stakes and found that those stakes did not tie to the permanent monuments and natural objects referred to in the patent, would you regard the stake as having any value as to where the claims were located?

A. In case the stakes and the natural monuments and ties did not agree, I would give the control to the natural monuments, providing that the stakes did not agree with them.

Mr. HELLENTHAL.—That's all.

Judge WINN.—That's all.

(WITNESS EXCUSED.)

(Court adjourned until 10 o'clock to-morrow morning.) [1277—1127]

MORNING SESSION.

August 8, 1915, 10 A. M.

The plaintiff, to further maintain the issues on its part, recalled as a witness in rebuttal, JOHN B. MARSHALL, who, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

**Testimony of John B. Marshall, for Plaintiff
(Recalled in Rebuttal).**

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You are the Recorder for the Juneau Recording District, and United States Commissioner?

A. Yes, sir.

Q. And as such you are the keeper of the records of the territory embraced within the Harris Mining District? A. Yes, sir.

Q. Have you in your custody as recorder all the water notices recorded for water locations made within the territory embraced within the Harris Mining District?

A. I have eleven books of what are known as Placer and Water Locations, and these are the records that I received when I entered upon the office, and so far as I know embrace all of the water locations that have ever been made in this territory embraced within the Harris Mining District.

Q. Mr. Marshall, you are familiar with the Harris Mining District—that is, commencing at Auk Village and running down the boundary line to the Taku River, and then down the inlet to Stephens Passage and back to the Auk Village?

A. Yes, sir.

Q. Now, have you made an examination, Mr. Marshall, of all the records of your office containing notices of water locations [1278—1128] for water rights located within the Harris Mining District?

(Testimony of John B. Marshall.)

A. I have.

Q. Have you an examination of each and all of such water notices to determine the date of location and date of record of each and all such notices?

A. I have.

Q. Have you made a further examination of those water notices to determine which of said notices designate the place of intended use? A. Yes, sir.

Q. Have you a record on which is shown the date of each location made within the Harris Mining District, the date on which the location notice was recorded, and also the fact of whether or not the place of use was designated in the notice?

A. I have made such a record; I will say that I didn't make the record in the first instance, the record was made and handed to me for checking, but I checked it and revised it to some extent.

Q. And the record as you now have it contains accurate data upon that subject? A. Yes, sir.

Q. And shows the date of location of each water notice within the Harris Mining District, the date of the recording of each water notice, as well as indicating as to whether each notice shows the place of intended use? A. Yes, sir.

Q. This, Mr. Marshall, in the memoranda or record which you have made. (Handing paper to witness.) A. Yes, yes.

Q. And it contains all the matters and things to which I referred? A. Yes, sir. [1279—1129]

Q. And it is correct and accurate? A. Yes, sir.

(Testimony of John B. Marshall.)

Mr. HELLENTHAL.—I now offer this memoranda in evidence.

The COURT.—Mr. Marshall, do I understand you to say that you have been over every record-book which is in your office to ascertain this information?

A. The eleven books of placer and water locations I have turned page by page and examined every location notice; I can see that it is possible I might have skipped a very small number of notices, but I hardly think that I have skipped any as I have turned them page by page and gone over them very carefully.

The COURT.—This document, what do you say as to whether or not it contains a résumé of each water location notice that has been made in what is called the Harris Mining District from June 27, 1881 to this date, July, 1914?

A. It does contain such a résumé.

The COURT.—And contains a statement of the name of the locator, the date of location, the date of recording, and where recorded? A. Yes, sir.

The COURT.—How many of those books were there, you say? A. There are eleven books.

The COURT.—How large are those books, Mr. Marshall?

A. The last one is the moderate sized book we are now using; they run from that to three that are about half that size, and run down to very small record-books like the other records.

The COURT.—The paper was prepared by you and your assistants?

(Testimony of John B. Marshall.)

A. The paper was not prepared by me in the first instance; Mr. Hellenthal brought it to me, and I took and checked it over; [1280—1130] I found some additional notices; I found in a few instances that the designation that they had didn't agree with what I found, and I changed to some extent the designation they had there; that is, in one of two cases I think they had the period between the date of location and the date of recording different from what I found it, and in one or two cases the place of use, in my opinion, was not designated, and in some cases it was designated when they had it wasn't, but I didn't very much alter the record as they had it.

The COURT.—Did you find any instances when they stated the place of use was not designated where they said it was designated?

A. My recollection is that they did; I haven't kept a separate memoranda of that, but I looked over the figures both ways; I found some places where they said the place of use was designated where I couldn't see that it was, and I found some places where they said it was not where I found that it was.

The COURT.—Well, was there any of those instances where there could be any doubt about where the place of use was?

A. I think that is true; I think that the only thing about this compilation that might be subject to criticism is whether or not the place is clearly designated, and what guided was whether or not a person could find an appropriate place of use.

The COURT.—Who passed on the question as to

(Testimony of John B. Marshall.)

whether or not it was clearly designated—does that involve any construction?

A. Well, the situation I meant was this: Sometimes it said to be used on a certain mining claim; I took that to be a designation of the use. Sometimes there are occasions where it gives courses and distances to a site where it was to be used—that, of course, was absolutely without any question; where it was placer mining claims the water location [1281—1131] notice was for working a certain placer claim—I took it that the place of use was on that claim.

The COURT.—What I mean, did you find any instances where the notice itself did not say anything about where it was to be used—I am not talking about clearly or not clearly, but whether you found any instances where any reference to the place where it was to be used was omitted, when, as a matter of fact, in the paper that Mr. Hellenthal handed you, it was shown that it did show where it was to be used?

A. Well, I think it is possible that some of the determinations I came to about it might be open to question; I read them over very carefully before determining and it seems to me that it said in each place; I think the list, as I checked it is an accurate list showing the place of use.

The COURT.—I think the paper is admissible.

(Whereupon said memoranda of water location notices was received in evidence and marked Plaintiff's Exhibit No. 41.)

Q. (By Mr. HELLENTHAL.) Mr. Marshall,

(Testimony of John B. Marshall.)

where the notice designated a place of use, such as being on a certain mining claim, designated one place of use with sufficient definiteness to show it was to be used on a certain mining claim, you have there indicated that it did show a place of use?

A. Yes, sir.

Q. Even though it also showed an indefinite place of use, where it had one definite place of use, regardless of any other indefinite place of use it contained, you have designated it as containing a definite place of use? A. Yes, sir.

Q. So that a notice that would say where the water is to be used was on a certain mining claim or elsewhere, you have indicated it as being definite as to the mining claim, and indefinite [1282—1132] as to the balance?

A. I have indicated it as the place of use.

Q. And where the place is definite, such as being indicated by courses and distances from a certain point, you have indicated that as being definite?

A. Yes, sir.

Q. So that this contains all the notices that give any definite place of use at all, whether they also contain indefinite ones and are open to criticism on that point? A. Yes, sir.

Q. And those are marked by the letters indicated in the legend? A. Yes, sir.

Q. Where the letter A follows a location notice, it means the place of use is designated?

A. Yes, sir.

(Testimony of John B. Marshall.)

Q. And the letter X, no place of use designated?

A. Yes, sir.

Q. It doesn't necessarily mean, then, that you, in making up this list, passed upon the question as to whether or not the place indicated was definite enough to meet all criticisms—the question that you were interested in determining was whether an honest attempt had been made in designating the place of use?

(Not answered because of objection.)

Q. Mr. Marshall, how did you arrive, in examining these notices, where the place of use is designated, at that point to know that was the correct point of use?

A. Well, whenever, from the notice as the same was prepared, one could determine where the place of use was, I put it in and followed it with the letter A, as indicating the place of use; when it was impossible to do that from the [1283—1133] notice, I used the letter X.

Q. What are the legends or letters B and O?

A. The letter B means that it was recorded within ten days or less after the location; and the letter O means that it was recorded—that a period of more than ten days had elapsed after the location before the recording was made.

Q. Wherever you may have found an error in the record prepared by my associates, you corrected the error, and it is now as accurate as you found it from your records? A. Yes, sir.

Q. Mr. Marshall, have you found in your exam-

(Testimony of John B. Marshall.)

ination—did you find any notices that originally, for instance, that did not designate a place of use but afterwards amended to show the place of use?

A. Yes, sir.

The COURT.—Are those mentioned in your report?

A. No; they are not; one, in making up the report could not do that without an explanation.

The COURT.—What I mean is this, is there any way in your report by which a person could get at that—so that anybody would know what you were talking about?

A. With the explanation of the check mark there on the side.

Q. I wish you would explain the mark on the paper in that regard, on exhibit No. 41?

A. Well, where there is a red check mark opposite the notice, it is opposite a defective notice in every instance.

Q. Is opposite a notice that was afterwards amended?

A. I would not say that the notice was absolutely amended by a formal amendment; in some of them the amendment was made, and some of them another notice was recorded by the same parties, covering, in most instances, exactly the same water in [1284—1134] the same location, but designating a definite place of use.

Q. Now, how are the notices marked on that ex-

(Testimony of R. W. Lindsey.)

hibit 41 that were afterwards amended in the manner you have stated?

(Not answered because of objection.)

(Witness temporarily excused.) [1285—1135]

The plaintiff to further maintain the issues on its part, recalled as a witness in rebuttal R. W. LINDSEY, who having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of R. W. Lindsey, for Plaintiff (Recalled in Rebuttal).

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Lindsey, you have been sworn?

A. Yes, sir.

Q. Were you with Mr. Wayland when he went up on these upper claims, the Keystone and the Taku Gold and Silver, to look for tunnels that the stakes of those claims were tied to in the patent notes?

A. I was with him one time when we were looking for tunnels.

Q. When was that?

A. I don't remember the exact date; I think it was some time in October, 1910.

Q. In the fall of 1910, anyway? A. Yes, sir.

Q. Did you find any tunnels?

A. We found several tunnels.

Q. Did you find any tunnels that answered the tunnels called for in the patent notes, if you adopted the stakes in the ground as the correct stakes?

(Testimony of R. W. Lindsey.)

A. We did not.

Q. What was the nearest to them that you found, nearest tunnels to answering any of those descriptions?

A. As I remember, it was somewhere from 20 to 25 feet.

Q. If you adopted that tunnel as being correct, how did that throw the other tunnel off that the other stake was tied to? [1286—1136]

A. There was no other tunnel that would fit the tie in the notes; there were several tunnels around there; the nearest one being somewhere about 40 or 50 feet off.

Q. Could you make one tunnel fit another tunnel?

A. No.

Q. Now, Mr. Lindsey, Mr. Wayland, I think, testified that this was on the 12th of October—is that right—will you fix the date as near as you can?

A. Somewhere about the middle of October, I should say.

Q. What year? A. 1910.

Q. Mr. Wayland and you together?

A. Yes, sir.

Q. Now, did you go upon the Lotta claim at any time to see whether there was an excavation there opposite that mill building? A. I did.

Q. What did you find in the way of an excavation—when were you there, Mr. Lindsey?

A. I was there about two weeks ago.

Q. What did you find there in the way of an excavation?

(Testimony of R. W. Lindsey.)

A. I found there was an excavation there.

Q. Was it a recent excavation, or one that had been there for many years?

A. Part of it was covered with brush.

Q. Not a recent excavation? A. No, sir.

Q. Did you measure that excavation?

A. I believe it was about 45x60 feet, as I remember it.

Q. Can it be plainly seen?

A. It can be plainly seen by anyone going down to the mill. [1287—1137]

Q. And it was partly covered by brush?

A. Yes, sir.

Q. Mr. Lindsey, are there any trees on corner No. 6, along where corner No. 6 of the Lotta is, or the stake in the ground? A. Yes, sir.

Q. You know where a number of large trees are around there?

A. Yes, I know there are trees there.

Q. Is that corner tied to any of those trees?

A. Not in the patent it isn't.

Q. Any of those trees given as bearings in the notes? A. No, sir.

Q. Now, Mr. Lindsey, I want to call your attention to Defendant's Exhibit "S"—have you a scale with you? A. No, I haven't.

Q. I also call your attention to the plat marked Defendant's Exhibit "T," which purports to be a copy of the official plat in the Surveyor General's office of the Lotta and other adjoining claims, and I will ask you to step up here to Defendant's Exhibit

(Testimony of R. W. Lindsey.)

"S" and see if Gold Creek is indicated on Defendant's Exhibit "S" in the same place as it shows on the patent plat.

(Not answered because of objection.)

Q. Mr. Lindsey, I will ask you this question: The creek as shown on exhibit "S," when was the first time to your knowledge it was ascertained that the creek ran approximately in that way upon the ground?

(Objection to foregoing question not sustained.)

Q. You were, in the year 1910, familiar with the records and data in the office of the Alaska-Juneau Mining Company with reference to the surveys?

(Objection to question overruled, but question not answered.)

Q. What is your name? [1288—1138]

A. My name is W. R. Lindsey.

Q. Are you familiar with the records of the Alaska-Juneau Gold Mining Company?

A. I am.

Q. Do you know what those records showed in 1910? A. Not all of them.

Q. I mean as far as Gold Creek and the Lotta claim are concerned?

A. I was familiar with the Lotta.

Q. Now, do you know whether at the time it was a known fact from the surveys of the Alaska-Juneau Gold Mining Company, that Gold Creek crossed the Lotta claim in no such manner as indicated on the Defendant's Exhibit "S"?

(Not answered because of objection.)

(Testimony of R. W. Lindsey.)

Q. Now, Mr. Lindsey, calling your attention to the Defendant's Exhibit "T," and Defendant's Exhibit "S," you will find on exhibit "S" that Gold Creek has been sketched across the Lotta claim—does that approximately show Gold Creek crossing the claim as it shows on the patent plat, the official plat of the Surveyor General's office, being the map which I have called your attention to, exhibit "T"?

(Not answered because of objection.)

Q. Will you, Mr. Lindsey, assuming this creek as platted on there by Mr. Wettrick is in approximately the correct position, will you plat upon exhibit "S," or mark the point where the Mulligan notice would fall upon that plat if the mill were shown to be on the Lotta claim in the position it is shown on the Defendant's Exhibit "T," being the same distance from the place where the creek enters the claim as it is shown on the map, and where the notice would fall if it were placed 150 feet below the mill building—have you now measured the map and found the point where the Mulligan notice would [1289—1139] fall under those circumstances?

A. I have.

Q. Mark that with the letter Q.

(Witness so marked map.)

Q. The point marked by you with the letter Q is the place where the Mulligan notice would fall if posted 150 below the mill, if the mill were platted on the Lotta and the creek were platted in accordance with the official plat in the Surveyor General's office?

(Testimony of R. W. Lindsey.)

A. Measuring down the creek the same distance as it is shown on this map, and going in from the corner and taking that distance from the pencil sketched creek, and then 150 feet below the mill in that position would throw it to the point marked G.

Q. There is another Q on the map—will you mark it Q-2?

(Witness so marked map.)

Q. That is how many feet below the southern line of the Lotta?

A. Approximately 50 feet, on this map.

Q. Now, if the creek were platted as shown in the plat attached to the patent itself, and the same method were followed, where would the Mulligan notice be with reference to the southerly side line of the Lotta?

(Not answered because of objection.)

Q. The mill, Mr. Lindsey, is right in the gulch by the side of the creek, right at the bank of the creek?

A. The new building is.

Q. The new building is right on the bank of the creek, that is the mill building on the Lotta?

A. Yes, sir.

Q. And wherever the creek is, the mill would always remain on the bank of the creek?

A. Yes. [1290—1140]

Q. Then, if the mill building is a fixed distance below the place where the creek enters the Lotta there would be no difficulty in showing on the map where the mill building would stand on the official plat or on any other plat where both the creek and

(Testimony of R. W. Lindsey.)

the claim were shown, would there—there would be no difficulty in doing that, Mr. Lindsey?

A. No; no difficulty in showing it.

Q. I am going to have you take the little plat attached to the patent, exhibit “U,”—I call your attention to that plat, and ask you to plat upon that the mill building in the same position shown on exhibit “S,” and show upon that plat just where the Mulligan notice would fall upon that plat—can you do that?

A. The same position with reference to the creek?

Q. Yes, the same position.

A. It would throw the Mulligan notice at the point marked X on exhibit “U.”

Q. Have you also placed the mill on there?

A. I have.

Q. Mark that mill on exhibit “U,” the place where the mill is.

(Witness does so.)

Q. Would the Mulligan notice then be above or below the line of the Lotta?

A. It would be below the line.

Q. How many feet below?

A. Approximately 40 feet.

Q. Now, I ask you to take exhibit “T” and plat the mill on there, and also the place where the Mulligan notice would fall if posted 150 feet below the mill?

A. I don’t know whether these are drawn to scale or not—these plats. [1291—1141]

Q. This is the official plat here.

(Testimony of R. W. Lindsey.)

A. It would throw the Mulligan notice at the point marked Y on exhibit "T."

Q. Have you also marked the mill on exhibit "T"? A. I have.

Q. Mark that with the word "mill."

(Witness does so.)

Q. How far below the Lotta line would the Mulligan notice be there?

A. Somewhere about 25 or 30 feet.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. Did you bring over that map or plat that I asked for yesterday?

Mr. HELLENTHAL.—I will state, your Honor, that that map shows the property up in the upper basin as well as some other matters that we don't wish to make public, and we didn't wish to bring it over.

Q. Mr. Lindsey, how long have you been working for the Alaska-Juneau and the Treadwell people?

A. Well, I first started to work for them in the fall of 1908.

Q. You have worked for them ever since 1908?

A. Not all the time.

Q. Well, what length of time between 1908 and the present time have you been out of their employ.

A. I have been working for them about five years.

Q. You were in their employ in August, 1910, weren't you? A. I was; yes, sir.

Q. You were never called upon prior to August,

(Testimony of R. W. Lindsey.)

1910, to make [1292—1142] any sort of examination and location of these various objects that you have located for Mr. Hellenthal on these maps and plats, were you?

A. No; not prior to August, 1910.

Q. You were never called upon to make any such investigation? A. No, sir.

Q. And as an employee of the Alaska-Juneau Company, prior to August, 1910, you were never called upon by Mr. Kinzie, or Mr. Wayland, or anyone else, to go up there to make any survey to ascertain where the lower side line of the Lotta claim was, were you? A. No.

Q. You had nothing to do with sending Lock Mulligan on these premises to post any water location notice in August, 1910, or any other time, did you, Mr. Lindsay? A. No; I did not.

Q. Has Wayland been in the employ of the Alaska-Juneau Company the same length of time you have been in the employ of that company?

A. I don't know when he started to work for the company.

Q. Was he with the company when you came here? A. He was.

Q. And is with the company now?

A. I think so.

Q. Is Mr. Wayland a superior officer in the Treadwell Company in regard to the surveying department? A. He was at that time.

Q. Is he yet?

A. I am not in the surveying department—I don't know.

(Testimony of R. W. Lindsey.)

Q. You have charge of another and distinct part of the business at the present time, Mr. Lindsey, have you? [1293—1143] A. I have.

Q. Now, Mr. Lindsey, you said that you and Mr. Wayland went up there on the property of the Ebner Gold Mining Company, what day in October, 1910, to ascertain where a certain tunnel is located, which tunnel is referred to on Defendant's Exhibit "S" as the tunnel just above the lower side line of the Keystone Lode claim?

A. I didn't say what day I went up there.

Q. What day was it?

A. I said I didn't know exactly.

Q. It was after August 1st, 1910, wasn't it?

A. It was.

Q. What month was it in?

A. It was in October.

Q. Was it subsequent to October 3d?

A. I believe it was.

Q. It was after you people undertook to put your dam in up there on Gold Creek, wasn't it?

A. I believe so.

Q. You never made any survey to ascertain anything about where the lower side line of the Lotta claim was before you put your dam in there, did you? A. I did.

Q. You never testified concerning any such one, did you?

A. I did; I have testified several times about it.

Q. Did you in this case?

A. I don't know whether I did in this case or not;

(Testimony of R. W. Lindsey.)

I did in the preliminary hearing, I believe.

Q. It was some time in October, 1910, when you and Mr. Wayland went up there to ascertain whether or not that tunnel, which was just above the lower side of the Keystone Lode Claim and [1294—1144] shown upon Defendant's Exhibit "S," was in the place that was called for in the field-notes, was it?

A. I don't know whether that was the time or not; I haven't scaled it off on that map to see.

Q. Did you have the official field-notes when you and Mr. Wayland went up there to ascertain this fact?

A. We had them over at the office; I don't know whether we had them that day or not; we had a copy of them.

Q. Of the patent notes?

A. We had a copy of the official notes of the survey.

Q. You had them with you up there?

A. Mr. Wayland had them—I didn't have them.

Q. Do you know whether or not the official plat in the Surveyor General's office, a copy of which has been offered in this case as Defendant's Exhibit "T," corresponds with the exhibit that is attached to the United States patent that is offered in evidence in this case and marked Defendant's Exhibit "U"—do you know whether these are the same or not?

A. Well, I couldn't say without checking them over; I haven't had a chance to check them over.

(Testimony of R. W. Lindsey.)

Q. You haven't checked them over at all?

A. Not this one; no.

Q. If that was just sketched in in the recorder's office and this was a copy of it, which would be more apt to be correct, the sketch of the Surveyor General's office or the one sketched in in the recorder's office?

(Objection to question and question withdrawn.)

Q. I will ask you, Mr. Lindsey, if you have had any experience in surveys for patents?

A. I never made any patent surveys; no.

Q. You are not a United States Deputy Mineral or Land Surveyor [1295—1145] at all?

A. No; I am not.

Q. You have never had anything to do with filing surveys for patent in the land office?

A. No, I have not.

Q. You know nothing about the procedure, what constitutes the complete plat and map?

A. I don't know the full procedure.

Q. You have never compared this sketch that has been offered in evidence in this case with the official map or plat or field-notes of the Lotta claim?

A. No; I never have.

Q. You don't know whether it is correct or incorrect? A. I don't know anything about it.

Q. Then, in tracing these objects upon the map, not knowing whether or not those plats are correct or incorrect, you don't know whether your placing of the objects which Mr. Hellenthal asked you to place upon those maps is correct or incorrect?

(Testimony of R. W. Lindsey.)

A. I was assuming the plat was correct in that case.

Q. If the sketch is wrong, then, of course, there would not be much to rely upon in your locating certain objects upon it?

(Question not answered because of objection.)

Q. Did you ever take the patent field-notes or the patent itself, of the different surveys that are included in the patent of the Lotta claim, and undertake from these field-notes, and from the ties to the monuments referred to therein, to locate the Lotta claim?

A. I never followed out all the ties; no.

Q. Did you ever examine the Lotta Lode claim in 1910 to ascertain what stakes were on it? [1296—1146] A. I did.

Q. When did you go up on the Lotta lode claim or any of the adjoining claims, the Taku, the Keystone or the Crown Point, to ascertain whether or not there were any stakes or monuments on them?

A. I was on there several different times.

Q. Well, what was the first time?

A. The first time was about the 28th or 29th of August.

Q. 1910? A. 1910; yes, sir.

Q. Did you find any stakes on the Lotta claim at that time? A. Not at that time; no.

Q. Did you look for any? A. I did.

Q. You don't want the Court to understand that on the 28th of August there wasn't upon the Lotta claim the stake which is referred to as stake No. 5 on

(Testimony of R. W. Lindsey.)

Defendant's Exhibit "S," and then following on up the lower side line of the Lotta you struck another stake, which is the first one on that line after leaving stake No. 5, marked in red on the same exhibit; and also that there was a corner post No. 6 and the end line No. 4—you don't want to state that in 1910 those stakes were not there, do you?

A. I didn't make any such statement.

Q. You said you didn't find them.

A. That is what I said; yes, sir.

Q. Did you make a good search for them?

A. As much as I had time that day; I couldn't go all over that claim in half an hour or an hour.

Q. That was on the 28th of August, 1910?

A. The 28th or 29th, I don't know which. [1297—1147]

Q. What time did you go up there?

A. I went up after lunch that day.

Q. You didn't have time to look up any stakes?

A. As far as I had time I did.

Q. Well, don't you know, Mr. Lindsey, at that time there was a well defined brushed out line on the lower side line of the Lotta claim?

A. I do not know it; no.

Q. Did you ever walk up the Basin road about that time or before that time, and look across the creek to see whether or not you could see a well-defined brushed out line on the Lotta claim?

A. I saw it after that time—several weeks later.

Q. How many times had you been up the Basin road prior to August 28th, 1910, Mr. Lindsey?

(Testimony of R. W. Lindsey.)

A. How far up the Basin road do you mean?

Q. Up as far as the Lotta lode claim.

A. I believe three or four times.

Q. How often had you been on the Lotta lode claim prior to August 28, 1910?

A. The same number of times—had to cross the end of the Lotta going up the Basin road.

Q. Was it you who went up and helped Datson locate the Oregon lode claim? A. No, sir.

Q. You were not with Datson when he located the Oregon? A. Had nothing to do with that.

Q. Now, then, you and Mr. Wayland, in attempting to ascertain something about a tunnel that is just above the lower side line of the Keystone lode claim, in 1910, didn't examine the upper end line, which is a continuous straight line of the [1298—1148] Crown Point lode claim, the Keystone and the Taku Gold and Silver and the Lotta lode claim—you didn't go along that line, did you?

A. Went only part of the way.

Q. Did you see any stakes along that line, then?

A. I remember seeing some stakes, but I don't remember now just what they were.

Q. Had you, prior to the time you and Mr. Wayland went up there found out whether there were any corner stakes or end stakes on the Lotta lode claim?

A. Yes, sir.

Q. And you found some stakes, you say, on this continuous straight line that is referred to on this exhibit "S" as the upper end line of the Crown Point, the Keystone, the Taku and the Lotta?

(Testimony of R. W. Lindsey.)

A. I didn't see all the stakes; there was one, I remember, at corner No. 6.

Q. Did you have the field-notes along with you to ascertain whether or not in running up this common end line I have referred to there were any ties?

A. Mr. Wayland had the notes with him.

Q. Did you look them over yourself?

A. I looked them over; yes, sir.

Q. Did you ascertain from the field-notes whether there were any ties along that upper end line?

A. I don't remember any particularly just now, except that one to the tunnel and the one to the mill.

Q. Well, now, Mr. Lindsey, will you look at this plat here that has been offered in evidence and see if you can find any other ties there between the tunnel and the mill—I will ask you this question to save time: Do you know whether there are [1299—1149] any other ties there in the field-notes of the patent other than the two you have just mentioned?

A. I know there is one tie to the mineral monument, that is the only one I remember now.

Q. Don't you know as you go up that end line that is common to the claims I have just mentioned, the Lotta, the Keystone, Crown Point and the Taku, all of them that are contained in that patent are tied up to each other and one another by common corner posts?

A. The notes call for common corner posts.

Q. Did you and Mr. Wayland undertake to find any of those common corner posts, and see if those claims were tied in together in order to ascertain the

(Testimony of R. W. Lindsey.)

lower side line of the Lotta claim?

A. As far as we went we tried to get all the ties we could.

Q. Just state to the Court all you got.

A. I don't remember getting any ties.

Q. The only tie then that you and Mr. Wayland used from the field-notes of the patent of the group of claims in question was the tie that you were looking for; that was made in running the lower side line of the Keystone lode claim, to a certain tunnel—that was the only tie you used?

A. We didn't use that because it wouldn't check.

Q. What was your purpose in going up there—what were you searching for, Mr. Lindsey, when you and Mr. Wayland were there—were you looking for the tunnel, or what were you looking for?

A. We were up there to tie in that tunnel; I don't know what instructions Mr. Wayland had; I went up with Mr. Wayland; he was in charge of the work.

Q. Then, as I understand, Mr. Lindsey, you were following out Mr. Wayland's instructions? [1300—1150] A. I was.

Q. You simply went up there under his instructions? A. I went with him.

Q. To find out what? Now, with reference to the tunnel, what did you understand you were to find out with reference to the tunnel just above the lower side line of the Keystone?

A. I don't know which tunnel you are referring to; there are three or four tunnels in a bunch there.

Q. That is what I am trying to find out, Mr. Lind-

(Testimony of R. W. Lindsey.)

sey, what you and he went up there for, as far as you know?

A. One of *things* we went up for was to see if the ties given in the patent notes to those tunnels would fit anything we found on the ground.

Q. That is, to find out whether that tunnel as it is called for in the patent field-notes could be found upon the ground, as it was called for in the patent notes?

A. To see whether there was any tunnel that fitted that tie as called for in the patent notes.

Q. So far as you know then, Mr. Lindsey, that is the only thing that you were up there for?

A. It wasn't the only thing; I know we were up there to find any ties that we could at the same time.

Q. You were instructed to find any monuments on the ground you were looking up?

A. I was instructed to find all the stakes and find all the markings.

Q. What stakes did you find?

A. I don't remember the stakes; it was four years ago and I didn't keep notes; I think Mr. Wayland made notes up there.

Q. Do you remember what stakes you found?

A. I remember corner stakes of the Lotta.

Q. Do you remember any other stakes you found up there in 1910 [1301—1151] on the Lotta?

A. Are you asking me any time in 1910 or that day?

Q. I mean what stakes you and Mr. Wayland found together—I am just confining my examination

(Testimony of R. W. Lindsey.)

now to the trip you and Mr. Wayland made up there?

A. That one day?

Q. Yes, sir?

A. I don't remember any other stakes we found that day.

Q. You found corner No. 6 of the Lotta, corner No. 6 was on the ground, and as it was afterwards established by the Court? A. It was.

Q. Now, is that the only stake which you and Mr. Wayland found that day?

A. I said I don't remember what other stakes we found.

Q. That is the only one that you remember?

A. That is the only one I remember now; yes.

Q. You don't want to state to the Court that the stake No. 5 on this plat, one of the stakes on the Lotta lode, No. 4, and then an intervening stake between 5 and 6, as well as the stake at the upper end line of the Lotta—you don't want to testify that they were not on the ground at that time, do you?

A. I didn't make any such statement.

Q. You don't want to testify they were not on the ground?

A. No; I won't testify there were not any of those stakes on the ground.

Q. Now, was your purpose in going up there to ascertain where the lower side line of the Lotta claim was?

A. I suppose one of the purposes was to ascertain the exact lower side line of the Lotta.

Q. How long were you and Mr. Wayland up there

(Testimony of R. W. Lindsey.)

to ascertain [1302—1152] about that, Mr. Lindsey? A. That day?

Q. What length of time did you and Mr. Wayland together work to ascertain the lower side line of the Lotta that day, or any other time?

A. We were up there a number of times.

Q. Well, I will confine it to this one particular time? A. We were there all day that day.

Q. Did you ascertain where the lower side line of the Lotta was that day?

A. It was a pretty hard thing to do definitely at that time.

Q. It was a pretty hard thing to do because you hadn't located any other stakes or any other ties, had you, Mr. Lindsey? A. Yes, I had.

Q. Why didn't you find these stakes then, 5 and 4?

A. I already knew those were in at that time.

Q. When did you find out they were there?

A. Sometime in September.

Q. 1910?

A. Corner No. 5 of the Lotta, witness corner for corner 4 of the Forrest—I knew that those were there in September, 1910.

Q. You knew at that time, too, Mr. Lindsey, that the survey of the Lotta, Taku, Keytsone and Crown Point, and I think the Golden Fleece, were surveys that are all included in one patent, and you knew from the field-notes that they are tied up with each other and with one another?

A. I didn't know at that time they were all in one patent—I knew they were all separate surveys.

(Testimony of R. W. Lindsey.)

Q. You didn't examine the field-notes?

A. I did examine the field-notes—I didn't examine the patent. [1303—1153]

Q. They were continuous right along, weren't they?

A. I don't remember whether they were all put together at that time.

Q. Mr. Lindsey, as a surveyor, if you were to go upon the ground to honestly undertake to locate a lode claim, I will ask you if you would not make a careful examination of the field-notes and all of the ties in it and the courses and distances, and the monuments, and then go upon the ground and see whether you could find any monuments or any stakes, and use all the data that you could gain both from your field-notes and from what you found on the ground in order to locate the claim—would you use that?

A. I would, if I had the time to put in that it would take.

Q. Were you so rushed when you went up there that you didn't have time to do that?

A. I didn't go over there except the times I was told to go.

Q. If you had, Mr. Lindsey, upon an examination of the field-notes found that corner No. 4 of the Lotta was in, corner No. 5 was in, the intermediate stake between 5 and 6 was in, No. 6 was in, and the one at the upper end of the Lotta in, and all marked "Survey 87," and the Lotta was Survey No. 87; and then you were to find out that in the field-notes and the survey they ran around the Lotta claim, and came

(Testimony of R. W. Lindsey.)

on back to corner No. 1, which is marked on this Lotta Lode Claim as 1, and went right up to the upper corner of the Lotta, continued right in a straight line, the same course as the end line of the Lotta, and went right up and made certain ties to certain corners, and went around and located the Taku lode claim, and tied that to the Lotta, and continued this survey right up that way, wouldn't all of those facts have been of very material help to you in locating [1304—1154] the Lotta lode claim on the ground—they would, as a surveyor, wouldn't they, Mr. Lindsey?

A. They certainly would all be considered.

Q. But you didn't have time that day to look them up and consider them, did you?

A. You couldn't do it all in one day.

Q. Now, then, I will take some of the questions I think were propounded to you the other day—you testified the other day, Mr. Lindsey, something about being up there lately, I think, to ascertain whether or not any of the dam of the Alaska-Juneau Company as it is now constructed was upon the Lotta lode claim; you testified to that the other day, didn't you?

A. No, I didn't testify to that.

Q. When Mr. Hellenthal had you on the witness-stand?

A. No; I haven't been up there to see anything about the dam lately; I didn't testify to any such thing as that, because I haven't been up there.

Q. You have been up there to ascertain whether or

(Testimony of R. W. Lindsey.)

not the dam as it is now constructed is on the Lotta lode claim as established by Judge Cushman, haven't you, didn't you make any survey to ascertain that?

A. Not lately; no.

Q. Didn't you state the other day, Mr. Lindsey, when you were upon the witness-stand that you had been up there and took some look over that line of the Lotta—the lower side line—to ascertain the exact location of the dam of the Alaska-Juneau Company—didn't Mr. Hellenthal the other day ask you some questions pertaining to that?

A. He didn't ask me any questions about that this year—if you will state a time in your question—
[1305—1155]

Q. You haven't been up there this year?

A. I have been up there this year, but not to make any surveys.

Q. Did he ask you any questions the other day as to whether or not you had made any examination to find out the exact position of the dam after you made the change—after Judge Cushman's decision?

A. I don't know whether he asked me any such question or not, but I haven't done it.

Q. I am mistaken then, I thought you had made the statement—I will drop it. I believe there were some questions asked you by Mr. Hellenthal about when you and Mr. Wayland went up there to ascertain where the Mulligan notice was—you saw the Mulligan notice, didn't you? A. I did.

Q. That Mulligan notice was approximately how far up on the Lotta claim, according to the boundary

(Testimony of R. W. Lindsey.)

line established by Judge Cushman, and according to the stakes on the ground—how far above that on the Lotta?

A. I don't remember what it was now; something like—I know it was 140 feet below the mill; I don't remember how far it was above the line.

Q. I will ask you if it isn't a fact, Mr. Lindsey, that after you had discovered where these stakes were on the Lotta lode claim in 1910, that you moved your dam further down the creek from where you undertook to construct it in the first place?

A. It never was moved from where it was first constructed.

Q. Are you sure of that?

A. It wasn't changed—I know it wasn't.

Q. Well, you know the place of intended diversion was changed by your company after you found these lower corner stakes of the Lotta claim, don't you?
[1306—1156]

A. I suppose it must have been—the dam wasn't put in where the Mulligan notice was.

Q. Now, on August 28th, didn't you know where all of those stakes were on the lower side line of the Lotta and at the center end line?

A. I didn't know where any of them were.

Q. You stated a while ago you knew where corner No. 6 was on the 28th day of August, 1910?

A. I didn't say anything of the kind.

Q. Wasn't that on the 28th of August?

A. We went up there on the 28th or 29th of August.

(Testimony of R. W. Lindsey.)

Q. Didn't you say that you ascertained on the 28th of August where such a stake was.

A. I didn't say any such thing.

Q. You knew where the intermediate post between 5 and 6 was on the Lotta when you were up there on August 28th, written on one side "Survey 87"?

A. I don't know whether it was or not; I didn't find it that day.

Q. You were not looking for it, were you?

A. I was looking for everything I could find.

Q. You didn't find anything at all—you didn't find the cut up there, did you? A. What cut?

Q. The tunnel that is over there and tied to it?

A. That tunnel hasn't anything to do with the Lotta claim.

Q. Don't you know in those patent field-notes that you hold in your hand which is part of the patent, that the beginning corner is No. 1, marked on this Defendant's Exhibit "S," and then they go ahead and go around the Lotta lode claim and mark its boundaries and come back to No. 1, go up to the upper corner, and then commence the survey of the Taku, [1307—1157] and tie that all into the common post—do you know that the field-notes show that?

A. The field-notes show that the beginning of the Lotta is corner No. 1, and the beginning of the Taku is corner No. 1 of the Taku Gold and Silver.

Q. Don't you know that the field-notes tie them up to a common corner post, and continue that way?

A. The notes have common corner posts.

(Testimony of R. W. Lindsey.)

Q. And then they run up that line, down the lower side line of the Keystone, all in this one common patent, and when they come down to a certain point in that they tie up to a certain tunnel; now, if the Keystone is tied up to the Taku Lode and the Taku is tied up to the Lotta lode claim, do you want to say that the Lotta claim is not tied up to the tunnel?

A. I said the survey of the Lotta lode didn't call for any tie to that tunnel.

Q. I am asking you to take the field-notes as set forth in the patent and follow them up, of all the mining claims in there, and then I will ask you if you want to state in doing that that the Lotta Lode claim is not tied to the tunnel that is near the lower side line of the Keystone—I mean, taking all the field-notes in that patent?

A. It is tied to other claims indirectly, but not in the survey of the Lotta claim; the survey of the Lotta claim does not call for that at all.

Q. You mean to go into this patent and pick out the Lotta lode claim, and then you want to say the Lotta is not tied to the tunnel?

A. That is what I said.

Q. Don't you know that is all one patent?
[1308—1158]

A. I never saw the patent at that time.

Q. I am asking you now—don't it give all these claims, 88, 89, the Crown Point, and so forth,—don't it give an aggregate of all these claims in this patent?

A. It does.

Q. Now, look over here at the beginning of the

(Testimony of R. W. Lindsey.)

patent—and “It appears that Samuel Coulter did, on the 10th day of June, A. D. 1889, duly enter and pay for that certain mining claim or premises known as the Lotta, Taku Gold and Silver, Keystone, Crown Point, Golden Fleece, Grand Review and Jewel Lode Mining Claims, designated by the ex-officio Surveyor General as lots Nos. 87, 88, 89, 90, 91, 92 and 93 respectively”—all included in one survey, aren't they?

A. No, they aren't; they are different surveys.

Q. All included in one piece of ground in the patent?

A. All included in one patent.

Q. One piece of ground as described, and it takes in all of them?

A. The patent takes in all of them.

Q. Do you want to say that being the case, and when the survey runs right along the upper side lines of these various claims and runs down the lower side line of the Keystone that the Lotta claim is not by that survey tied to the tunnel?

A. It is tied indirectly—it is not tied directly.

Q. It is a tie, isn't it? A. Yes.

Q. But you modify it by saying indirectly?

A. You could get that tie by following out all the surveys up there.

Q. You and Wayland did not attempt to find that one single tie to the tunnel on that day, did you?
[1309—1159]

A. On that particular day we didn't try to find anything else.

(Testimony of R. W. Lindsey.)

Q. You and Mr. Wayland did go back to make a report when you found out where the lower side line of the Lotta was, didn't you? A. No.

Q. Didn't make any report on it then? A. No.

Q. When did you report, that you found the lower side line of the Lotta claim?

A. I didn't make any report on it; Mr. Wayland had charge of that.

Q. What was the first time you were up there after August 28th, looking for this lower side line, do you remember?

A. I was there some time in September.

Q. Do you remember the date?

A. No; I don't remember the exact date.

Q. Did you find the stakes then?

A. I found corner No. 5 of the Lotta and the witness corner 4 of the Forrest sometime in September.

Q. And corner No. 6, didn't you?

A. I don't remember when the time I saw corner No. 6 was.

Q. That was prior to September 12th, wasn't it, or 10th?

A. It was about that time—I don't remember the exact date.

Q. It was before you established the grade that you ultimately built your flume line upon?

A. Oh, no; it was after—oh, yes; it was after that—after we established the grade the flume line is built on now.

Q. You established a grade for the flume line about September 12th, you and Mr. Wayland?

(Testimony of R. W. Lindsey.)

A. About that; yes,—that is the reason the dam was moved down and the flume was put in the present position; we wanted to be sure to be off the Lotta claim.? [1310—1160]

Q. And the dam was moved down in view of the survey you and Mr. Wayland made there on September 12th?

A. It was to be sure to be off the Lotta claim.

Q. That was the first time you made a good survey to find out where the lower side line of the Lotta claim was, and that was the first time you examined that—was that the first time you came to the conclusion of where the lower side line of the Lotta was?

A. I didn't come to the conclusion that the lower side line of the Lotta was at that place at the time.

Q. When did you come to that conclusion?

A. I didn't come to the conclusion, I didn't have anything to do with it; I was told to locate the flume grade and the dam was moved off the Lotta claim.

Q. That was before the case was tried before Judge Cushman—that was about the 10th or 12th of September, 1910?

A. That was September 12th, or sometime in there.

Q. 1910? A. Yes, sir.

Judge WINN.—That is all.

(Whereupon court adjourned until 2 P. M.)

(Testimony of R. W. Lindsey.)

AFTERNOON SESSION.

August 8th, 1914, 2 P. M.

R. W. LINDSEY on the witness-stand.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Lindsey, Judge Winn asked you what you did in the way of making a survey and locating the southerly line of the Lotta, I think on the 28th or 29th of August, 1910— [1311—1161] will you please testify now as to just what you did in that connection and what you found as the result of your efforts?

A. We started at corner No. 5 of the Idaho and ran a line up the creek and located the Mulligan notice; and then from the patent notes figured the location of this notice with reference to the Lotta claim, and also platted it on the map.

Q. You started it from corner No. 5 of the Idaho making the survey as you have indicated that you did in that connection, and located the Mulligan notice in that manner, with reference to the field-notes of the patented claims— did you find the Mulligan notice on or off the Lotta claim?

A. It was off the Lotta claim.

Q. Below it? A. Yes.

Q. Mr. Lindsey, you stated that you were given instructions to be sure and keep the dam off the Lotta—I think you made a statement in answer to Judge Winn's question that was the occasion for moving the dam; was it for moving the dam or moving the survey of the dam.

(Testimony of R. W. Lindsey.)

A. If I made such a statement I didn't intend to; all that was done was making another survey.

Q. The dam itself was never moved?

A. There was no dam in there at that time.

Recross-examination.

(By Judge WINN.)

Q. Now, Mr. Lindsey, let me see—you made a survey on September 12th, 1910, to make a grade, and you did survey a grade upon which you afterwards built your flume? A. No. [1312—1162]

Q. What survey was this you made on September 12th, 1910?

A. I ran a level line from the upper water tunnel up the creek for the grade; when I found it was too high for the position of the dam I reported it to Mr. Kinzie and he told me to make another survey and move it down; that is where the second tunnel was started, and the dam was put where it is now.

Q. Don't you know that upper tunnel was started with the expectation of taking water off the Lotta claim?

A. I do not; no sir—the upper tunnel?

Q. You know if you had run that grade on the grade of the upper tunnel it would have taken the water off the Lotta claim approximately where the Mulligan notice is posted?

A. It would have taken it from there some place; that is why it was moved down.

Q. Now, then, there was no work done on your flume line looking towards taking water out of Gold

(Testimony of R. W. Lindsey.)

Creek on your present grade until after September 12, 1910, was there?

A. Not on the present grade; no.

Q. Then Kinzie's people went ahead and put their dam in Gold Creek first without having established any grade, didn't they? A. No.

Q. Why, they didn't have part of the flume in there on September 12th? A. No.

Q. Didn't have any part of the dam in there on September 12th? A. No.

Q. No part of the dam was built by the Alaska-Juneau people prior to September 12th, 1910?

A. No. [1313—1163]

Q. Of course, you naturally went ahead, Mr. Lindsey, and established your grade before building your dam, didn't you? A. Certainly.

Q. Yes, that is the logical way to do it. Now, you testified to Mr. Hellenthal a few moments ago that some time in August you ran a traverse line from some point on the Idaho claim, was it?

A. We ran a line from corner No. 5 of the Idaho.

Q. Where is the Idaho with reference to anything that is on Defendant's Exhibit "S," Mr. Lindsey?

A. The Idaho, it is a point, I suppose, that is what is supposed to represent point No. 5 (indicating)—just below the Colorado claim.

Q. In an easterly direction from the Colorado claim? A. No, westerly?

Q. The Idaho and the Colorado claims are all claims that were patented subsequent to the Lotta claim, were they not? A. I believe so.

(Testimony of R. W. Lindsey.)

Q. There isn't anything in the field-notes of the Lotta patent that refers to either one of those claims, is there?

A. No, but there is in those claims that refer to the Lotta.

Q. And that is the reason that you took that as the point, isn't it?

A. That is one of the reasons, yes; because it was tied to the Lotta through these other claims.

Q. You thought that was a good way to locate the Lotta, did you?

A. About the only way to locate it at that time.

Q. Were not the stakes of the Lotta on the Lotta side line at that time? [1314—1164]

A. I don't know; I suppose there were some stakes there; I didn't see them.

Q. If it has been proven they were there, wouldn't it be easy to go up and look for the Lotta, which is one of the largest *claim* on the creek?

A. It would, if you could find them.

Q. You noticed that line brushed out there in 1910?

A. Not at that time.

Q. What time did you? A. Some time in 1910.

Q. And you undertook then to survey and to locate the Lotta?

A. We didn't make the survey until Mr. Hill made those surveys.

Q. And so from your own patents you undertook from the field-notes of those to locate the Lotta?

A. Yes, sir.

Q. And that was what date?

(Testimony of R. W. Lindsey.)

A. That was on the 28th or 29th of August, I couldn't say which date.

Judge WINN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Corner No. 5 of the Idaho was a well-known corner, was it not, Mr. Lindsey? A. Yes.

Q. Mr. Lindsey, when you were up there on the 28th or 29th of August did you cross the lower side line of the Lotta, as marked between stakes 5 and 6 in the ground? A. Yes, sir.

Q. And you didn't observe at that time any brushed out line? A. I did not.

Mr. HELLENTHAL.—That is all. [1315—1165]

Recross-examination.

(By Judge WINN.)

Q. Just one date I want to fix a little more definitely. Now, let's see, Mr. Lindsey—maybe I got mixed up on this—as I understand it you made a survey of the upper tunnel grade on September 12th, 1910, and about a week later than that you made a survey of your present grade and the grade upon which your flume was ultimately constructed?

A. It was several days later, I wouldn't say it was a week.

Q. You testified before in this case it was about a week subsequent to the 12th, didn't you?

A. It was several days later, I wouldn't say just how much.

Q. If you said about a week then your memory was pretty fresh on it, wasn't it, in the Basin case?

(Testimony of R. W. Lindsey.)

A. I don't know if it was any fresher then than it is now.

Q. It is here as follows—Page 1036 and 7 of Volume 3, of Cause No. 2155 of the Circuit Court of Appeals:

“Q. Were you employed to go up there, instructed to go up there and locate a flume grade? A. I was.

Q. When did you do this? A. I believe the first survey was made on September 12th for the flume”—you remember testifying to that?

A. I believe I did.

Q. “Q. You located both ends of the grade? A. Yes, sir. Q. Is that the present grade? A. No; it was about 16 feet, I believe, above the present grade.

Q. That is the height of the original tunnel? A. Yes, sir.” Did you testify to that?

A. I believe I did.

Q. “Q. When did you locate the second grade? A. I think it was about a week afterwards approximately. I don't know [1316—1166] exactly”—you testified to that didn't you? A. I think so.

Judge WINN.—That is all.

Mr. HELLENTHAL.—Mr. Lindsey, in answer to Judge Winn's question, did you mean to say there was no work done there in building houses and trails and things of that kind until after that survey was made, or did you mean to say there was no work done in excavating that particular place until after that survey?

A. That is what I said, there was no work done on that particular grade; there was a lot of work done

(Testimony of R. W. Lindsey.)

around there before that.

Mr. HELLENTHAL.—That is all.

(WITNESS EXCUSED.) [1317—1167]

The plaintiff, to further maintain the issues on its part, introduced as a witness in rebuttal EDWARD WEBSTER, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of Edward Webster, for Plaintiff (In Rebuttal).

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name? A. Edward Webster.

Q. Where do you live? A. Juneau.

Q. Do you know where the Harris Mining District is? A. Yes, sir.

Q. When did you come to Juneau? A. 1881.

Q. What occupation did you follow when you came here? A. Mining.

Q. How long did you follow that occupation?

A. Until 1889.

Q. Where did you follow it?

A. In Silver Bow Basin.

Q. In the Harris Mining District? A. Yes, sir.

Q. You at one time operated the mine known as the Humboldt? A. Yes, sir.

Q. That is situated right above the Ebner mine?

A. Yes, sir.

Q. Were you here when the Harris Mining District was organized?

(Testimony of Edward Webster.)

A. No; I came in 1881, and I think it was in the fall of 1880 it was organized. [1318—1168]

Q. Anyhow, you know it was organized about that time? A. Yes, sir.

Q. Do you recall the miners' meeting called in the latter part of the year 1888 for the purpose of passing upon the question—that is, discussing or deciding upon the question as to whether the Commissioner for the Juneau District should thereafter be recorder for the Harris Mining District without further election?

(Not answered because of objection.)

Q. You remember there was a meeting called in 1888 of the miners? A. Yes; I do.

Q. Toward the fall of the year? A. Yes, sir.

Q. What was the purpose of calling that meeting?

A. The way I understand the purpose of it was to decide for the recording district what the recorder should do; at that time there seemed to be two recorders, and they decided then that the Commissioner should be the recorder for the Harris Mining District.

Q. Did that refer to the present incumbent Commissioner at that time or to all future commissioners?

A. I wasn't at the meeting, I was in the Basin at the time.

Q. I am asking you as to what the meeting was called for.

A. It was called for the purpose of deciding about the recording of the district; it seems there were

(Testimony of Edward Webster.)

two recorders, the court recorder and the recorder that was recording for the district.

Q. And the question was to determine what to do about that? A. Yes, sir.

Q. As a result of that meeting, where has the recording of the Harris Mining District been done since, do you know? [1319—1169]

A. By the Commissioner since.

Q. There were rules in force in the Harris Mining District relating to the appropriation of water and the acquisition of water rights while you were mining, Mr. Webster?

(Not answered because of objection.)

Q. Were the rules in force relating to the appropriation of water and the acquisition of water rights during the years you were mining in the Basin—that is to say from 1882 to 1889?

A. Why, yes—that is, we located our water right in the Basin what we supposed was under the miners' rules and recorded it here; if I remember right old Colonel Dixon was recorder when we recorded our water right.

Q. Now, where were those recorded, do you know, Mr. Webster—the rules that were in force at the time you have testified to—in whose custody were the rules and records?

A. To the best of my recollection it was old Colonel Dixon; he was the recorder when I came here; he had a little place when I came here near the butcher shop.

Q. Were the rules of the district relating to the

(Testimony of Edward Webster.)

water appropriation recorded there with Colonel Dixon? A. As far as I know.

Q. Were those rules as recorded with the recorder relating to the appropriation of water and the acquisition of water rights generally resorted to during the years between 1882 and 1889?

A. As far as I know they were.

Q. Since that time you have not been mining?

A. No, sir.

Q. And you don't know what the rules are now?

A. No, sir.

Mr. HELLENTHAL.—You may cross-examine.
[1320—1170]

Cross-examination.

(By Judge WINN.)

Q. Mr. Webster, you never looked up the records from 1882 to 1889 to find out if the people adhered to any rules, did you?

A. That I couldn't say—everybody was recording here.

Q. About the time in which they recorded, you don't know anything about that with reference to what time they posted the notice?

A. I didn't look over the records to see what time they recorded.

Q. Let me ask you, Mr. Webster, if you attended any meeting of this organization *called the* miners of the Harris Mining District yourself?

A. Yes; I was at one or two—I didn't take any part in them.

(Testimony of Edward Webster.)

Q. Do you remember what year it was that you attended?

A. I think there was one; if I remember right, I was at a meeting in 1882 when I first came here.

Q. Do you remember of having—I will hand you this little book that has been referred to in this case, called “Book, Mining District, August, 1881, to February, 1888”—did you ever see that record-book, Mr. Webster? A. No, sir.

Q. Never saw it? A. No, sir.

Q. I will ask you, Mr. Webster, if you ever attended a meeting which was recorded on page 91 of this minute-book, which I exhibited to you, in which the following resolution was passed: “The regular annual meeting of the miners of Harris Mining District was held on February 12, 1887, to elect a District Recorder for Harris Mining District for the ensuing year. D. H. Murphy, Esq., was chosen Chairman, and John G. Heid, Secretary. There being no opposing candidates for said office of District Recorder, upon motion of S. Lewis the rules [1321—1171] were suspended and Lewis L. Williams, the present incumbent, was chosen the recorder by acclamation. On motion the meeting adjourned *sine die*”—did you ever attend that meeting?

A. I did attend a meeting, but I don't remember if it was this one.

Q. Lewis L. Williams was then United States Commissioner and Recorder? A. Yes, sir.

Q. And he evidently had been acting as recorder

(Testimony of Edward Webster.)

for the Harris Mining District prior to 1887, hadn't he—do you remember that?

A. I don't remember just what year Williams did take it or what year he came here.

Q. Well, there was a meeting at this place in 1886, the year before—I will ask you if you remember anything about this: "On motion the election was to continue and the polls to be kept open until 4 P. M. of this date. And at 4:15 P. M. the chairman announced the result of the election as follows, viz.: Total number of votes cast, 177; for L. L. Williams, 110; for John Timmons, 64; rejected, 3; L. L. Williams majority, 46. Whereupon L. L. Williams was declared duly elected as Recorder of Harris Mining District for the said unexpired term"—do you remember of attending a meeting of that kind?

A. No; I wasn't there.

Q. On November 17, 1886?

A. No; I wasn't at that meeting; I remember about it, but I wasn't at the meeting.

Q. Now, here is another meeting, Mr. Webster—I will ask you if you remember this one, on page 92 of this record-book of the Harris Mining District that I just exhibited to you: [1322—1172] "The regular annual meeting of the miners of the Harris Mining District, Alaska, was held, pursuant to the regular call, at the courthouse of the Town of Juneau, Alaska, on the 11th day of February, 1888. Upon motion, John G. Heid was chosen chairman, and John Olds secretary. Upon motion of John Curry, Esquire, the rules were suspended and L. L.

(Testimony of Edward Webster.)

Williams, the present incumbent of the office of Recorder for said Harris Mining District, was elected by acclamation, for the ensuing year, as Recorder for said Harris Mining District, Alaska. Dated February 11th, 1888." Do you remember of a meeting of that kind?

A. I remember of a meeting; I remember when they had that meeting, but I didn't attend it.

Q. That is the last record of any meeting that is made in this minute-book, February 11, 1888?

A. Now, if my memory serves me right there was a meeting in September, 1888, when they decided for to have the Commissioner as recorder for the Harris Mining District.

Q. He had been recorder for two years before that? A. He was elected every year.

Q. There isn't any record of any meeting here after February 11, 1888—you didn't attend any such meeting in September, did you, Mr. Webster?

A. No, I wasn't at the meeting in September.

Q. You don't know what took place, of your own knowledge?

A. Not of my own knowledge, but Mr. Van—

Q. I don't want anything that anybody told you.

A. I intended to go to the meeting that night, because we were going to decide on two or three different things.

Q. The books had been in the possession of L. L. Williams for two years prior to that time—you know that, don't you? [1323—1173]

A. I know he was recorder then.

(Testimony of Edward Webster.)

Q. And the old courthouse was up on the hill at that time? A. Yes, just about where this one is.

Judge WINN.—That's all.

Mr. HELLENTHAL.—That's all.

(WITNESS EXCUSED.) [1324—1174]

The plaintiff, to further maintain the issues on its part, introduced as a witness in rebuttal JOHN G. HEID, who, then being duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of John G. Heid, for Plaintiff (In Rebuttal).

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is John G. Heid? A. Yes, sir.

Q. Do you live in Juneau? A. Yes, sir.

Q. How long have you lived here, Mr. Heid?

A. Since March, 1885; I think in March, 1885, I think it was.

Q. You have lived here continuously ever since?

A. Yes, sir.

Q. What is your occupation or profession at present? A. Practicing law.

Q. How long have you practiced law here?

A. Ever since 1885.

Q. Are you familiar with an organization known as the ——— A. Yes, sir.

Q. Were you ever recorder of that district?

A. I was.

Q. In what year?

A. I was the last recorder, elected in 1886.

(Testimony of John G. Heid.)

Q. I call your attention now to a little book, from which a portion has been offered and received in evidence, one of the pages of this book purports to be one of the records of the [1325—1175] Harris Mining District—you recognize that as one of the records of the Harris Mining District as the same were in your possession when you were the recorder of the district?

A. Yes, sir; that is one of the books.

Q. Calling your attention now to this book,—how is it marked on the outside, Mr. Heid?

A. That is—part of the label is torn off “Book—Harris Mining District”—this is a minute-book of the miners of the Harris Mining District.

Q. Now, Mr. Heid, while waiting for the book, do you recall a meeting of the miners being held of the Harris Mining District some time in the fall or summer of 1888, called for the purpose of determining upon the future recorder of the district?

A. I cannot recall the time, but there was a meeting which grew out of the uncertainty of the situation of the recorder for this section; it was a long story that led up to it—I could give that too, but to answer the question yes or no, I couldn't give you much information.

Q. You know there was some such a meeting about that time?

A. Some time in the fall; it was for the purpose of weeding out what was called by most people the Mining Recorder and having only one recorder, who was the United States Commissioner, first appointed

(Testimony of John G. Heid.)

by Judge Dawson, who made an order directing me, I being the last recorder, to deliver over all these records to the United States Commissioner—that is how the records got out of the Mining Recorder's hands into the Commissioner's hands.

Q. For a year or two before this meeting was held, the miners held a meeting every year to elect a recorder?

A. Held their elections every spring, and held their meetings [1326—1176] every spring.

Q. And the Commissioner has always acted as Recorder ever since?

A. In the fall of 1886 Judge Dawson, who was appointed judge, came back out here—in 1884, when Congress passed the Organic Act giving some kind of a civil government to Alaska, it provided also for commissioners who would have to be recorders, and the Court would have to appoint them for the recording district; Judge Dawson was sent out here, and the first thing I knew I was served with an order signed by Judge Dawson, in the fall of '86, to turn over all my records to the United States Commissioner—that he was now the Commissioner of the Juneau Recording Precinct and it included—

Q. That included within its boundaries the Harris Mining District? A. Yes, sir.

Q. And to settle this conflict, the meeting was called in the fall of 1888?

A. It was in the fall, and it was called to get the miners together for the reason some of them were dissatisfied—a lot of the old-time prospectors and

(Testimony of John G. Heid.)

miners didn't like the idea of anyone coming in here and interfering with their mining organization,—they were dissatisfied and wanted to proceed and elect a recorder—that is how it came about that these meetings were called; many of the miners didn't want the conflict—they only recorded location notices and things of that kind with the mining recorder, and recorded mortgages, deeds and things of that kind with the Commissioner, and it would simply make a conflict between the records here, and for that reason the majority of the miners wanted to call an election and elect their own recorder for the district, then [1327—1177] they proceeded the next year again, but the majority were opposed to it, and then finally in 1888 it was in such a way that we never heard anything more of it; the miners gave up the idea of electing their own recorder after that.

Q. And then they decided that the Commissioner should always be the recorder?

A. No records were made after I resigned; the Commissioner had all the records.

Q. After that meeting was held the Commissioner had all the records as the recorder for the Harris Mining District?

A. Yes; the Commissioner acted as the recorder for the Harris Mining District absolutely.

Q. And always has so acted ever since that meeting?

A. No other recorder in existence; they were all turned over to him.

Q. I now call your attention, Mr. Heid, to another

(Testimony of John G. Heid.)

book from which a page has been read in evidence, produced from the records of Mr. Marshall's office, and ask you if you can identify that as one of the records of the Harris Mining District when you were recorder? A. Yes, sir.

Mr. HELLENTHAL.—This is a book numbered 1 of Placer Claims and Water Claims, 1881 to 1888.

Q. This other book that you have already referred to as being the minute-book of the Harris Mining District, commencing in 1881, to February, 1888, that is also one of the records that was in your possession as Mining Recorder? A. Yes, sir.

Q. Now, Mr. Heid, do you know whether the rules of the miners as recorded in this book relating to the appropriation and acquisition of water rights, limiting the question to water [1328—1178] rights and not referring to the other rules, have been generally observed by the miners from the time that the rules were adopted up to the present time?

A. Now, I want to say this much, that Judge Dawson, about the mines, felt as though the decision of the Court would govern those things, but as to the acquisition of water it is the only law in existence to-day; I don't know of any other law—it is simply an appropriation.

Q. Were these rules relating to water rights generally observed by the miners from that time on up to the present time in the Harris Mining District?

A. I don't know of any other laws in existence except that in this district; there is no special legislation on the acquisition of water in Alaska.

(Testimony of John G. Heid.)

Q. Have the miners generally followed these rules?

A. They do now as they did then—I mean, in the way of posting their notices, saying how many inches, and saying where they wanted to use it.

Q. And recording the notices?

A. I guess everyone did; I don't know within what time; if a person makes any location I guess they have it recorded.

Q. Do you know that they generally followed these rules?

A. Yes; I think that 99 out of 100 that located any water would record it.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. Recorded but never recorded with respect to any time, have they, Mr. Heid?

A. I didn't look—I don't know what the individuals did. [1329—1179]

Q. Now, Mr. Heid, did you ever, as an attorney, search the records here to find out how many water locations you have made out for clients and filed?

A. No.

Q. Don't you know that a large majority of the water locations you have made out and filed in the records here have been recorded all the way from 10 days to three months after they were posted on the claims—that is, you know that that rule as to a specified time for recording hasn't been observed, don't you?

(Testimony of John G. Heid.)

A. I want to say this that between the 1st of June and the 1st of October, and after that time between the 1st of October and the 30th of May, that there is a vast difference, and I don't know whether I ever did record in those days from that time on.

Q. That is after the records were turned over to the recorder?

A. I didn't watch it, then, but, as I say, I don't know of any special legislation with reference to water rights in Alaska, excepting those rules that had been observed all the time.

Q. Do you know whether or not they observed that part of the rule pertaining to the commencing of work within 20 days after they filed their location notice?

A. I will tell you right now, you could ask the average miner and he would tell you the same thing, that he has right along.

Q. That they have commenced work *with* 20 days? A. Followed the old custom.

Q. How many have been doing that—how many of your clients have been doing that?

A. I haven't followed it up to see what they did.

Q. Do you know that the miners of to-day are following that rule—that they have to commence work within 20 days, and record it in 10 days—do you know of such a rule existing to-day? [1330—1180]

A. There may be such a law; it depends on what the people do, that is what establishes a custom;

(Testimony of John G. Heid.)

whether there is a law and whether they do it or not I won't say.

Q. If they don't do it, you won't say, as an attorney, that it was a custom?

A. It would depend—if it was generally done that would establish the custom.

Q. Have you, as a lawyer, Mr. Heid, followed the custom of recording your water location notices within 10 days after they were posted on the claim?

A. I don't know.

Q. Do you know that at least two-thirds of the water location notices that you have had anything to do with since 1888 were filed a long time after the time prescribed by the rules?

A. They were not if they were in the Harris Mining District; I am speaking within the Harris Mining District—I didn't have to record if I located outside of the Harris Mining District.

Q. What water locations have you, within the last 10 years, made out and filed within 10 days?

A. I don't know any in the Harris Mining District.

Q. How many water locations within the last 20 years, as an attorney, have you made out and caused to be filed within 10 days in the Harris Mining District? A. I couldn't tell.

Q. Now, Mr. Heid, you testified in the case of C. M. Thorndyke and others against the Alaska Perseverance Company, didn't you? A. Yes; I did.

Q. Let me ask you a question first—when was Lewis L. Williams [1331—1181] first elected re-

(Testimony of John G. Heid.)

order of what is known as the organization of miners in the Harris Mining District?

A. The record will show that; it seems to me it was in the fall of '86 or '87.

Q. Yes; he was elected in the fall of '86, and at the time he was elected to that office he was then acting as United States Commissioner?

A. Well, he was elected after I resigned and turned the books over.

Q. To whom did you turn the books over?

A. To L. L. Williams, in compliance with the order of the Court.

Q. Where is there any such order of the Court?

A. I think you will find it of record.

Q. Do you say there is any order on record in this court ordering any books turned over to the United States Commissioner, L. L. Williams?

A. You will find it was; you will find it in that order where Judge Dawson at that time established the boundaries of the Juneau Recording District.

Q. When did Dawson cause to be organized what is known as the Juneau Recording District?

A. I don't know.

Q. It was when the first judge came here, wasn't it? A. No.

Q. Dawson was the first judge, wasn't he, after the civil law was extended to Alaska in 1884?

A. Yes, sir.

Q. He came here, and, under the law, caused a recording district to be formed, known as the Juneau Recording District?

(Testimony of John G. Heid.)

A. I think that is what you call it.

Q. Do you know where the boundary lines of the Juneau Recording [1332—1182] District so formed under Judge Dawson were with respect to the boundary lines of the old Harris Mining District.

A. I couldn't tell you—it went way down below Cape Fanshaw—about 30 miles below.

Q. Is that the Commissioner's district you are talking about now?

A. Yes, sir; it took in the Harris Mining District.

Q. It took in the Harris Mining District and a lot of other territory, didn't it? A. Oh, yes.

Q. The boundary lines were not coextensive with each other, were they—that is, I mean the boundary lines of the Harris Mining District were not the same as the boundary lines of the Juneau Recording District, were they?

A. The certificates were generally made “Located in the Harris Mining District, in the Juneau Recording District.”

Q. The recording district that was created under the law when Dawson came here, when civil government was extended to Alaska in 1884, was not the same in extent as the Harris Mining District, was it? A. No; it was greater.

Q. And included a whole lot more territory?

A. Included a lot more territory and included the Harris Mining District.

Q. Now, isn't it a fact, Mr. Heid, that Williams was elected recorder in '86, and since that time no

(Testimony of John G. Heid.)

other person has been elected recorder?

A. Yes.

Q. Who did he succeed?

A. He succeeded me; that is, I think it was for the unexpired term; they wouldn't give up so it was determined to run someone; they ran Jack Timmons and we all went up to beat Jack Timmons so as not to get the records in a muddle. [1333—1183]

Q. Now, in this minute-book, Mr. Heid, we find here at page 89 the following: "On motion the election was to continue and the polls to be kept open until 4 P. M. of this date. And at 4:15 P. M. the chairman announced the result of the election as follows: Total number of votes cast, 177; for L. L. Willims, 110; for John Timmons, 64; rejected, 3"—that is the first election you remember of Williams having been elected, isn't it? A. Yes, sir.

Q. Now, on page 91, the following takes place—the date of that is February 12, 1887, page 91, of the minute-book: "The regular annual meeting of the miners of the Harris Mining District was held on February 12, 1887, to elect a district recorder for Harris Mining District for the ensuing year. D. H. Murphy, Esquire, was chosen chairman and John G. Heid, secretary. There being no opposing candidate for district recorder, upon motion of S. Lewis the rules were suspended and Lewis L. Williams, the present incumbent, was chosen the recorder by acclamation. On motion the meeting adjourned *sine die*." You remember that meeting?

A. Yes, I do.

(Testimony of John G. Heid.)

Q. On the next page, page 92, of the same minute-book, the following appears: "The regular annual meeting of the miners of the Harris Mining District, Alaska, was held pursuant to the regular call, at the courthouse, in the Town of Juneau, Alaska, on the 11th day of February, 1888. Upon motion, J. G. Heid, was chosen chairman and John Olds, secretary. Upon motion of John Curry, Esquire, the rules were suspended and L. L. Williams, the present incumbent of the office of recorder for said Harris Mining District, was elected by acclamation, for the ensuing year, as recorder for said Harris Mining District, Alaska. Dated February 11th, 1888." Now, you said [1334—1184] you were acquainted with that book of minutes?

A. Yes, sir.

Q. There isn't any other record in that book of any other meeting, is there, Mr. Heid?

A. No, not where I have referred to; the miners would meet and elect a chairman; one chairman might be elected at one meeting and another might be elected at another meeting.

Q. Isn't that the last meeting, Mr. Heid, that was ever held?

A. There was another meeting, I will tell you here—

Q. I don't want you to tell me.

A. It isn't really what you might call a miners' meeting, because the miners' organization had practically disbanded, when you come down to it, but there was some proceedings in keeping up the

(Testimony of John G. Heid.)

organization, and the dissatisfaction came up because at this last election there was a negro they put up as a candidate against Williams; of course, he couldn't win, but at the same time to settle that dispute, the miners had called another meeting, and it was determined to simply disband; of course, they couldn't do anything else under the order of the Court.

Q. Of course, the civil government was extended and they had established a recording district?

A. Yes; it was the Juneau Recording District, including the Harris Mining District.

Q. To refresh your memory on some of these matters I will read from page 829 of your testimony that was given in the case of Thorndyke vs. The Alaska Perseverance Mining Company—"Q. Now, in 1187—I will ask you if there has ever been any meeting of the society called the Miners of the Harris Mining District, meeting and making any rules and passing any laws or doing any other work since the time you last [1335—1185] mentioned?

A. I could not remember the minutes. Q. I think the last is in 1887—February, 1888? A. That was about the only one, and that was for the purpose of keeping up the mining records, keeping all the records in the hands of the commissioner—the mining rules and regulations were only formed to govern the location and holding of mining claims prior to May 15, 1884—the passing of the Organic Act—after the Organic Act had been passed, of course, it provided that the laws of the United States in re-

(Testimony of John G. Heid.)

spect to mining would be the laws of the territory." You remember of having testified substantially to that on the trial of that case, don't you?

A. Yes, I do.

Q. Now, another question: "Q. What do you know about the custom which has been followed in regard to filing notices of mineral claims and water rights and notices of taking of any other Government land, mineral or non-mineral, has that custom been followed? A. We have always recorded in the office of the United States Commissioner, and there was no other recording office then." Did you testify to that? A. That is right; yes, sir.

Q. Now, another question: "Q. I will ask you if there has been any exact or particularly specified time in which a notice of a mining claim—either quartz or placer, or water had to be recorded before the passage of the act—was there any particular time after 1887? A. No, there was not after 1887, no specified time. The only mining that was done in Silver Bow Basin was in the summer of 1886, and I think in 1887, the entire Basin passed into the hands of the Nowells and similar large companies—200 feet was a little claim for a creek claim, and was divided into small holdings and a great many were relocated—the parties quit and finally these all drifted [1336—1186] into one thing, and for that reason you cannot call it any placer mining except what was done by the Nowell Company in the ditch."

A. I didn't say ditch—whoever reported that

(Testimony of John G. Heid.)

didn't get half of it right, but I guess he put it as near correct as he could get it.

Q. "Q. I will ask you what has been the practice in Court, whether or not the rules were relied upon in regard to the size of the claims, the time of recording the notice—have they been relied upon? A. They were in force and regarded to be the law so far as the rights in relation to mines adopted before the civil law came in, but after that they did not cut any figure."

A. I testified to that; I did, yes; for placer claims.

Q. Now, did you following that, on cross-examination by Mr. Isreal testify as follows: "Q. You don't mean to say, Mr. Heid, that the coming of the civil law abrogated the rule that you were required to record the notice of claims and water rights? A. They did not do that absolutely, but it went into disuse." Didn't you testify to that in that case?

A. I may have, yes; I may have; that answer was with reference to mining claims.

Q. Don't you know, Mr. Heid, that you testified in that case absolutely as I have read?

A. Yes; yes.

Q. And you testified just as it is written there, that the rules in regard to following them, out, whether they pertained to the recording of notices of mining claims or water locations, that you said it fell into disuse after the courts were established here? [1337—1187]

A. Well, now, if that reporter got it right—there are a number of mistakes in there; in the first place,

(Testimony of John G. Heid.)

speaking of placer mining in a ditch; what I testified to was this: That after the civil law was established and came in force here, after the Organic Law was actually passed and the civil law was extended to Alaska, that the United States' laws with respect to mining should be the law of the district, and it was on that theory that I was examined and I answered the questions.

Q. Don't you know, Mr. Heid, that the same proposition was involved in that case about these mining rules and regulations that is involved in this case, involved here now?

A. The question is, what is involved here now?

Q. The question is whether those old rules and regulations that were passed here by the miners away back in the '80's are still in force and effect in Alaska?

A. Why, with reference to placer and lode claims they are not, but with reference to water locations, there is no other law excepting the old law; there is no special legislation; you cannot point to a statute with reference to the location of water applicable to Alaska.

Q. Mr. Heid, you know that I was one of the attorneys in that case, the Thorndyke case?

A. Yes, you were.

Q. You know I stood here in court and examined you in that case? A. Yes, sir.

Q. Don't you know that Mr. Isreal put that question to you and you came back and emphatically stated that all of those old rules had been abrogated

(Testimony of John G. Heid.)

and fell into disuse since the coming of the civil law?

A. The record will show if it is correct; if I did, I want to [1338—1188] correct that, because there is no special law that you can find anywhere that will specify what you shall do to acquire water within the district of Alaska except the old miners' rules and customs.

Q. Now, here is another case, Mr. Heid; I think you testified a while ago that you testified to this question the way it is answered here: "Q. What do you know about the custom that has been followed in regard to recording notices of mineral claims and water rights and notices of taking up any other Government land, mineral or non-mineral, has that custom been followed? A. We have always recorded in the office of the United States Commissioner and there was no other recording office then.

Q. I will ask you if there has been any exact or particularly specified time in which a notice of a mining claim—either quartz or placer or water had to be recorded before the passage of the act—was there any particular time after 1887? A. No; there was not after 1887, no specified time; the only placer mining that was done in Silver Bow Basin was in the summer of 1886, and I think in 1887 the entire Basin passed into the hands of the Nowells and similar large companies—200 feet was a little claim for a creek claim, and was divided into small holdings and a great many were relocated—the parties quit and finally these all drifted into one thing, and for that reason you cannot call it any placer mining

(Testimony of John G. Heid.)

except what was done by the Nowell Company.”
You testified to that, didn’t you?

A. Yes, I guess I did, but I want to tell you right now with reference to the recording, as I said I didn’t specify as to any particular time; the row was over the Mountain lode claim, and that was the one I was interested in— [1339—1189]

Q. Let me ask you, Mr. Heid, don’t you know that in that Thorndyke case Mr. Hellenthal, who was acting for Thorndyke and the other defendants in that case— don’t you know that he set up and declared in his complaint that these miners’ rules and regulations were in force and effect and they relied upon that in the trial to defeat the water right which the Alaska Perseverance Mining Company was defending?

A. I suppose he did, because that is the only important point on which it could be tried, and he fell down because he couldn’t show compliance with the rules by the miners.

Q. Now, wait —have you read the decision of what that case turned upon?

A. No, I don’t remember it.

Q. You know that two water rights were in dispute at that time?

A. I was representing Martin; I had nothing to do with the water rights; it was a question of allowing them to use the surface ground.

Q. I know, Mr. Heid, but you were a witness in the case, weren’t you? A. Yes, I was.

Q. You have read Wickersham’s decision on that,

(Testimony of John G. Heid.)

haven't you, and you know that the miners' rules and regulations were brought into that case?

A. My recollection of Wickersham's decision was that he held it was the relating back to the initiation of the rights, and for that reason he knocked Thorndyke off the map; yes, sir.

Q. Do you remember in that case, Mr. Heid, that the Perseverance location happened to be within all the requirements of the miners' rules and regulations, if they were in force,—that it was filed within 10 days and posted—don't you remember that?

A. No; I don't remember it; if I could see the record I could [1340—1190] tell in a minute whether they claimed it or not, but as I say, that is the only way by which you could get a water right, where there is no special enactment by Congress or any by our own legislature, specifying what steps you must take in order to acquire a right to the use of water, and it is all based upon the decisions of the court, which have been based upon the old miners' rules and regulations, and that is the only law you could find in Alaska that governs the acquisition of water.

Q. What decision, Mr. Heid, do you know of that is based on the old miners' rules and regulations?

A. I didn't say any local decisions, in the Supreme Court of the United States, but in California, Nevada, Idaho and Kentucky the Supreme Court has made laws that govern the acquisition of water.

Q. Now, Mr. Heid, since I have read over the testimony which you gave in the Thorndyke case,

(Testimony of John G. Heid.)

do you want to state to the Court here that the matter of filing water location notices within 10 days has been followed in the Harris Mining District, or anywhere else?

A. I will state that as far as that is concerned I never looked that up; I don't know whether they did or did not; the record ought to decide that.

Q. You said, Mr. Heid, in that Thorndyke case that that matter of recording within 10 days had not been followed, didn't you?

A. I don't remember that my testimony extended to the point of the miners' rules themselves, which they had passed in this district, because they were of no particular force, because they were practically wiped out by the orders of the court; yet it seems to me the miners continued in the same custom.

Q. Do you want us to understand now that you didn't make these [1341—1191] answers to these questions where your attention was called here to the time of recording the water location notices and that you said no custom was ever followed?

A. I wouldn't dispute it, this was so long since; it depends on who was questioning and the way the questions were put.

Q. There never has been any mining laws in Alaska, has there, Mr. Heid, except what was extended here by Congress?

A. Yes, and the laws of the United States with respect to mining shall be the laws for Alaska.

(Testimony of John G. Heid.)

Q. The act of 1866 pertaining to locating of water and public lands in Alaska is a United States Statute, and has been extended to Alaska—you know that, don't you? A. Yes, sir.

Q. You say prior to the enactment of some legislation here that there was nothing but the United States Statute pertaining to mining claims—now, why do you say these rules and regulations of the miners in this little pamphlet, have fallen into disuse—how do they come in conflict with any United States law? A. I don't think they do.

Q. You don't think they have fallen into disuse?

A. I want to say to you that my testimony went to the quartz as well as to the water; the conflict was between the Martin lode claim, and that Martin lode claim had nothing to do with the water—they didn't claim any part of the water.

Q. Mr. Heid, wasn't this suit that I am talking about here over the Lurvey Creek water right?

(Question not answered.)

Q. Mr. Heid, you know that by the act of Congress that the mining laws of the United States were extended to Alaska, and you also know that by the act of Congress the laws pertaining to [1342—1192] the appropriation and acquisition of water were extended to Alaska; now, how is it that you understand that the rules and regulations that are included in this pamphlet or book of the miners' organization pertaining to the acquisition of mines fell into disuse, and that pertaining to water did not fall into disuse—how do you explain that?

(Testimony of John G. Heid.)

A. Well, the statute of the United States specifies how placer and quartz shall be located, but it doesn't specify how you shall acquire water, except that the prior locator has the best right and this is the form of law upon which the custom of the miners is based.

Q. I will ask you, Mr. Heid, if you didn't testify further as follows, in the case of Thorndyke against the Alaska Perseverance Mining Company: "Q. The commissioner under the Dawson order became the instrument of the miners' organization? A. He made an order turning over to Judge Williams and said under the law he was on the only lawful recorder." You testified that way in the Thorndyke case, didn't you?

A. That is what Judge Dawson did; yes.

Q. "Q. They were turned over to him? A. Yes, sir. Q. Then these miners met and elected him recorder? A. No, they elected Williams so as to have no conflict; they did not want any conflict in the records." You testified to that?

A. Yes, sir; in substance.

Q. "Q. And he was the last recorder ever elected? A. They did not elect him a mining recorder; they elected him in order to defeat the miners who did not want any interference with their records."

A. That is about it. [1343—1193]

Q. "Q. In order to defeat a large majority you elected him recorder? A. Well, it was simply for the purpose of preventing the records being separated."

A. Yes, I think that is right.

(Testimony of John G. Heid.)

Q. "Q. At the same time he was commissioner?

A. Yes. Q. What was the object? A. The effect of it was they never had any more conflicts." That was true, wasn't it?

A. I think that is right, as near as I can remember.

Q. "Q. They were continuing him as mining recorder? A. No, sir." That is true, isn't it?

A. I think that is true, yes; and I can explain why.

Q. "Q. From that day to this every mining claim or water right in the Harris Mining District that has been staked has been recorded with the United States Commissioner in conjunction with the old mining rules? A. No, sir; in conjunction with the Federal law." You answered that question that way, didn't you? A. I probably did; yes, sir.

Q. "Q. I don't want to argue with you. I realize how much you have got the advantage, but I want you to tell me if this is not a fact that the records of the mining recorder was conducted without a break in the record of lode claims. A. No, sir; there was no such a thing as a mining recorder; this was the United States Recorder—he had been recording these locations—those he recorded after the miners' recorder went out."

A. Yes, that is right, all mining claims.

Q. You testified to that?

A. I think I did; it was so long since I cannot recall everything I said.

Judge WINN.—That is all. [1344—1194]

Mr. HELLENTHAL.—That is all.

(Testimony of John G. Heid.)

The COURT.—I want to ask you some questions, Mr. Heid—have you located any water rights in the Harris Mining District? A. No.

Q. Never? A. No.

Q. Not a one? A. Not that I remember.

Q. Have any of your clients ever located any water rights in the Harris Mining District?

A. It is possible they did.

Q. Could you tell me the names of any?

A. No; I cannot, unless the record might disclose it, I could not.

Q. You don't remember the name of any client of yours who has ever located any water in the Harris Mining District? A. I cannot, I do not remember.

Q. Do you know of any person, whether a client or not, who has located water within the Harris Mining District—I will change that: Are you familiar with any water location within the Harris Mining District?

A. I know in a general way where they are, that is about all.

Q. Do you know what any particular location notice states?

A. I have never looked up the records.

Q. Do you know within what time any water location notice has been recorded—within what time after the notice was posted?

A. Now, does the Court ask me with reference to any particular one?

Q. Yes, any particular one.

(Testimony of John G. Heid.)

A. No, I cannot say with reference to that. [1345—1195]

Q. Do you know of any water location notice that has been recorded within 10 days after it was posted?

A. No, sir; in years gone by that was what they always did; now, what they have done in late years I do not know.

Q. I am asking you about your knowledge,—do you know of any water location notice that has been recorded within 10 days after it was posted?

A. No, I don't know whether I can recall that or not; I might have known of many of them, but then I cannot recall them now.

Q. Now, can you recall any water location notice that was recorded after the expiration of 10 days after it was posted? A. No.

Q. Can you recall, or do you know, of any instance in which a water right in the Harris Mining District has been held or found to be forfeited because the notice was not recorded within 10 days after it was posted?

A. I don't know of any that had not been recorded.

Q. What is your answer to that question?

A. I don't know of any.

Q. Do you know of any instance in which the question was raised as to whether a water right should be forfeited because it was not recorded within 10 days after it was posted?

A. I do not know of any litigation—

Q. I am not talking about litigation—any instance in which it was held to be forfeited either by the min-

(Testimony of John G. Heid.)

ers, or general consent, or litigation?

A. In the Harris Mining District?

Q. In the Harris Mining District.

A. No, I don't remember of any; there has been, of course, disputes over the use of water—that is, as to the quantity, [1346—1196] one claiming more than the other, but when the court speaks with reference to forfeitures and abandonments and things of that kind, the records will disclose that if there had been such a thing.

Q. Well, now, what would you say, was there in August, 1910, or was there not, a custom in the Harris Mining District by which water rights that were not recorded within 10 days after they were posted were forfeited—was there or was there not such a custom in August, 1910?

A. Oh, I wouldn't say that.

Q. You wouldn't say what?

A. That there was such a custom; I don't know that the question ever was raised; that would be four years ago, and the water rights at that time had all been taken up many years before.

The COURT.—That is all.

(WITNESS EXCUSED.)

(Whereupon court adjourned until 10 o'clock to-morrow morning.) [1347—1197]

The plaintiff, to further maintain the issues on its part, called as a witness in rebuttal HENRY STAATES, who being duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

**Testimony of Henry Staates, for Plaintiff
(In Rebuttal).**

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is Henry Staates?

A. Henry Staates; yes, sir.

Q. You live in Juneau? A. Yes, sir.

Q. When did you come to Juneau, Mr. Staates?

A. In 1884.

Q. You have lived here ever since? A. I have.

Q. What has been your occupation since coming here?

A. I came here as United States Commissioner; I have been mining since.

Q. How long have you been mining?

A. The first time I mined was in '85.

Q. You were recorder prior to that time, and commissioner?

A. When I came here Colonel Dixon was recorder; then they had an election and I was elected afterwards.

Q. You succeeded Colonel Dixon as recorder for the Harris Mining District? A. Yes, sir.

Q. Do you know where the Harris Mining District is, Mr. Staates?

A. I was familiar with it; yes.

Q. Now, Mr. Staates, who succeeded you as recorder? [1348—1198]

A. I think it was John Hoyt, to the best of my recollection.

Q. Do you know who succeeded Hoyt?

(Testimony of Henry Staates.)

A. I think it was turned over to Williams, when Judge Dawson came, as my recollection serves me.

Q. Do you recall a meeting held in 1888, somewhere in the summer or fall of that year, a meeting being called at that time to consider the question of merging the offices of United States Commissioner and Mining Recorder of the Harris Mining District—a meeting of the miners?

A. Well, I remember something about a meeting of that sort; that is a long time ago to remember details.

Q. You say you remember there was such a meeting called?

A. I think Judge Dawson made an order in court to that effect, after Judge Williams came; it seems to me that he did.

Q. Were you at that meeting, Mr. Staates, or were you not? A. No, I wasn't there.

Q. Do you remember whether after that meeting was held what was done—whether future recorders were ever elected by the miners of the Harris Mining District, or whether the commissioner acted after that as recorder?

A. (Question objected to and withdrawn.)

Q. Mr. Staates, after that time, after that meeting in 1888 was called, and after it had completed its deliberations, whatever they were, who acted from that time on as the recorder for the Harris Mining District?

A. The Commissioner—the United States Commissioner.

(Testimony of Henry Staates.)

Q. That is from that time on to the present time?

A. To the best of my knowledge, I think so.

Q. I want to call your attention, Mr. Staates, to a little book marked "Book—Mining District—August, 1881, to February, 1888"—a portion of this book has been read and received in evidence; [1349—1199] do you recall that book as being one of the records of the Harris Mining District in your possession while you were recorder?

A. Yes, I recognize that; that was in the records as handed over to me by Colonel Dixon.

Q. That was turned over to you by Colonel Dixon as one of the records of the Harris Mining District?

A. Yes, sir.

Q. In this little book, Judge, are some rules and regulations relating to the appropriation of water and the acquisition of water rights, which have been read into the evidence; were they there at the time these records were turned over to you—was the book in the same condition? A. They were.

Q. Do you know, Judge Staates, whether the miners of the Harris Mining District from that time on, during the time that you have been here from 1884 or '5, up to the present time, have generally observed and followed the rules as recorded in that book as part of the records of the Harris Mining District so far as they relate to the appropriation and acquisition of water rights—do you know that they generally observed them?

A. As far as I know they complied with them.

Q. The first question is, do you know whether they

(Testimony of Henry Staates.)

generally observed it while you have been living here?

A. It was observed up to that time, the time the civil law came here.

Q. Relating to water rights, I mean—I will ask you and you may answer if you know whether the rules, so far as they relate to water rights—I am not speaking of the mining rules now, but so far as they relate to the water rights and the acquisition of water rights and the appropriation of water— [1350—1200] these rules as they are on record in the little book—have been generally observed by the miners during the years you have lived here?

A. To the best of knowledge they have.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. Judge Staates, do you remember an election which was held by the miners of this so-called Harris Mining District in 1886 in which Judge Williams, who was then United States Commissioner, was elected to fill an unexpired term of John Heid, as secretary of the miners' organization?

A. I remember.

Q. Do you remember that Lewis L. Williams then was United States Commissioner also?

A. Yes, sir.

Q. Now, do you remember another election held for the election of a secretary in 1887, and Lewis L. Williams at that time acting as United States Commissioner under the civil law, and that he was again

(Testimony of Henry Staates.)

elected as recorder for the Harris Mining District—you remember such an election? A. Yes.

Q. Now, this little minute-book, Judge Staates, the last minute that is made on it, I will tell you substantially what it is—it is made on page 92 and is another election which takes place on February 11, 1888; Lewis L. Williams, who was at that time also United States Commissioner, was elected recorder for the Harris Mining District—do you remember that last election or last meeting there was held in 1888?

A. Yes; I remember there was quite a bit of talk about that. [1351—1201]

Q. Now, at that time Judge Dawson was here as United States District Judge, wasn't he?

A. Yes, sir.

Q. And you remember that the mining laws were extended to Alaska in 1884, weren't they?

A. Yes; the Organic Act.

Q. Do you remember also there was a section of the United States Statute providing for the acquisition of water on public domain—do you remember such a statute of that kind also?

A. I remember it.

Q. You know that since 1884, since the civil law went into effect, you know that there never has been any miners' meetings held by that so-called miners' organization? A. Not to my knowledge.

Q. Now, then, in this little book it shows a meeting that was held in 1888 and was held for the purpose of electing Lewis L. Williams, who was then the

(Testimony of Henry Staates.)

United States Commissioner, as recorder for the Harris Mining District—that was the last meeting then that was held by that organization that you have any remembrance of? A. It was.

Q. Did you attend that last meeting that was held in 1888?

A. My recollection is that I was there.

Q. Now, don't you know that there had been some sort of a contention among the miners at that time belonging to this organization as to whether or not they were going to submit to Judge Dawson's ruling and turn over their records to the United States Commissioner, or whether they would go ahead and keep up the organization?

A. Yes; it was discussed very thoroughly.

Q. Now, don't you remember also that all those who were in favor of keeping the organization and going ahead and electing their [1352—1202] officers were defeated, and Judge Williams kept the books as he had been keeping them before?

A. Yes, sir.

Q. The fact of the business is, Judge Staates, isn't it, that even these books and records had been turned over to Judge Williams in 1886, when he assumed the duties of recorder—do you remember that?

A. Yes.

Q. And then there was no necessity of any further turning over of the books, because in 1887 and 1888 didn't he have possession of them by reason of his being the recorder? A. Yes.

Q. Now, at that time, in 1884, or shortly there-

(Testimony of Henry Staates.)

after, there was formed what was called the Juneau Recording District, and that was formed under the law after Judge Dawson came here, wasn't it?

A. It was called the Harris Mining District.

Q. That is the old miners' organization called the Harris Mining District, but do you know of any recording district which was organized,—that is from memory, without looking at the books—when Judge Dawson came here?

A. Judge Dawson made an order extending the boundaries; that is a matter, I think, of record; the new boundaries took in Admiralty Island; the original Harris Mining District, the boundaries went down to the Taku, and then at Montana Creek it was a separate recording district; the miners here had miners' meetings, and West Wadelich was the first recorder there, and the first record ever made in the district was recorded by him.

Q. That was another district that the miners formed back in the '80's? [1353—1203]

A. Yes; before civil law came here.

Q. Then afterwards the recording district under Dawson was formed so that it embraced the Montana Recording District too, didn't it?

A. Yes; all this territory.

Q. And embraced a whole lot of other territory besides the Harris Mining District? A. Yes.

Q. Now, after that there was no further election of any recorder for what has been known as that parcel of land that formed this big district, known as the Harris Mining District—no further elections

(Testimony of Henry Staates.)

held? A. Not to my knowledge.

Q. And since that time the only recorder that they have had here for the Montana Recording District or the Harris Mining District—the only place that any papers have been filed has been in the United States Commissioner's Office, ex-officio recorder, hasn't it? A. That is my understanding.

Q. Then, don't you know, Judge, that this miners' organization fell into disuse after its disorganization in 1888, didn't it? A. I don't know.

Q. Have you made any water locations since 1888?

A. Yes; I have made quite a few.

Q. Where did you make them?

A. Made them up on McGinnis Creek and on Admiralty Island.

Q. Were they in the Harris Mining District?

A. No.

Q. They were outside of the Harris Mining District?

A. They were outside of the original Harris Mining District. [1354—1204]

Q. You remember that the Harris Mining District under the miners' organization extended from the mouth of Salmon Creek down to Taku River, and then backward on the mainland for about 15 miles, and afterwards it was changed—do you know what change was made in the boundaries afterwards?

A. When Judge Dawson extended the boundaries he went back to the British line; that is a matter of record; I could not give it in detail; took in a big scope of territory; there was some discussion about

(Testimony of Henry Staates.)

taking in Killisnoo, but they wanted to be in the Sitka District and so it was not annexed.

Q. Did you understand that this district which was formed by Judge Dawson was laid out under the law, or was it laid out under the miners who had heretofore been constituted a body, by the miners, to organize the Harris Mining District?

A. That was laid out by the order of Judge Dawson.

Q. This organization known as the Society of Miners that belonged to the Harris Mining District had nothing to do with laying out the boundaries of it at all, Judge Staates? A. I don't think so.

Q. Have you since 1888 made any locations of water at all in the Harris Mining District?

A. No.

Q. You have not? A. No.

Q. Since 1888, Judge, as to what rules people have followed in taking up water you know nothing about?

A. Well, I think they always complied with the rules—that is, recorded within 10 days; about the recording of mining claims, there was no hurry about that but the water rights they recorded [1355—1205] within 10 days.

Q. Have you examined the records to ascertain how many people lived up to that 10-day rule?

A. No.

Q. Do you know personally of your own knowledge of anybody who has filed a location notice in the Harris Mining District who has in all respects com-

(Testimony of Henry Staates.)

plied with those rules that were passed in 1881 or '82? A. In the Harris Mining District?

Q. Yes,—do you know of anyone who has complied with them? A. I don't believe I do.

Q. Now, then, not knowing then what they did in relation to filing those notices, and having no individual knowledge of anyone who has complied with them, you don't know whether or not it is being generally complied with or not, do you?

A. Well, I don't know; I never paid much attention to that.

Q. You have had no necessity, so far as you are personally concerned in making water locations in the Harris Mining District, since 1888, to observe this rule, have you? A. No, I haven't.

Q. Now, you made some outside of the Harris Mining District, didn't you? A. Yes, sir.

Q. Do you remember when you made them?

A. I made some two years ago up on McGinnis Creek.

Q. That was outside of the Harris Mining District? A. Yes, sir.

Q. Do you know how you designated those notices; whether they were in the Harris Mining District or some other district?

A. I think *there* were located in the Harris Mining District. [1356—1206]

Q. You know it has been a custom amongst all the people when they did put up a location notice of water location, whether it was in the Harris Mining District or outside of the Harris Mining District, to

(Testimony of Henry Staates.)

tack on that word, Harris Mining District, don't you? A. If they did, the records will show that.

Q. Don't you know that the miners and prospectors, as a rule, Judge Staates,—those who have come here since 1888, a large majority of them have never known where the boundary lines were of the Harris Mining District? A. I couldn't say.

Q. Well, have they put in the Harris Mining District in location notices away up around Berner's Bay and Young's Cove and far outside of the Harris Mining District—if they have, they evidently didn't know much about the boundaries, did they?

A. I wouldn't think so.

Q. Did you ever hear, Judge Staates, any prospector or any miner, since 1888 state in your presence what the boundary lines of this so-called Harris Mining District were back in the '80's?

A. I have no recollection of it.

Q. Never heard anyone—do you know what rules and regulations the miners had followed in locating placer and quartz claims since the early '80's?

A. I have had experience myself.

Q. What rules and regulations did you follow in making locations of mining claims?

A. The United States law, the act of '84.

Q. Did you or have you known of anyone that, since 1884, followed the rules and regulations that were laid down in the Harris Mining District with respect to the locating of either placer or quartz?

[1357—1207]

A. Yes, I think the placer ground that was located

(Testimony of Henry Staates.)

up in this Basin was under the Harris mining rules, in not over 20-acre lots; my impression is that they complied with the Harris mining laws.

Q. When was that, Judge Staates—in what year, do you know?

A. Well, it was along in the '80's.

Q. Some time prior to 1888?

A. I am inclined to think it was; I would not be positive in regard to that.

Q. What I was getting at, Judge Staates, after the miners had this meeting in 1888 and elected Judge Williams, I will ask you if since that time there has been any attempt made to follow the rules and regulations as were laid down by the miners' organization in taking up either quartz or placer claims?

A. No; they followed the United States law.

Q. Of your own personal knowledge, you have never known of any individual, since 1888, who, in taking up a water right or privilege, has followed the rules as so laid down by that organization called the Miners of the Harris Mining District?

A. I have not.

Q. Do you remember a clause that was contained in the rules and regulations pertaining to how you would forfeit a water location—you remember what clause the miners' rules and regulations had pertaining to this feature?

A. My impression is—you mean the Harris Mining District?

Q. Yes, sir. A. I think it was 10 days.

(Testimony of Henry Staates.)

Q. If they did not record it within 10 days they would forfeit their rights to pursue the work and put the water to use?

A. That is my impression. [1358—1208]

Q. Did you ever know of any contest arising before this so-called miners' organization concerning a forfeiture of water rights under that clause in the miners' rules?

A. If I remember right, there was some difficulty up in the Basin with Cooms, I think, and Harkrader; I am not familiar with it; I wasn't interested in it anyway.

Q. You don't know of your own personal knowledge, of any such doctrine being applied by the miners, where somebody forfeited a right by reason of not filing within 10 days, or commencing work within 20 days—you don't know of any such matter ever being settled by any miners' organization, do you?

A. I do not.

Q. And you don't remember, of your own personal knowledge, of any such difficulty having arisen since 1888, the last meeting of the miners?

A. Not to my knowledge.

Q. You have never known anyone to have forfeited a claim because they did not commence work within 20 days after the posting of the notice or that they forfeited it on the ground that they had not recorded it within 10 days, have you? A. No.

Q. How many water locations, if any, Judge Staates, do you know of having been filed prior to

(Testimony of Henry Staates.)

1888, or since 1888, in which they would designate in the notice the exact site to which the water was to be conveyed to be put to use?

A. Well, I know what locations I have made.

Q. And the locations you made were outside of the Harris Mining District and still you followed the Harris Mining District rules, did you?

A. Yes, sir.

Q. You still followed them?

A. Yes, sir. [1359—1209]

Q. To what point, do you remember, in any one of your notices did you designate the water was to be used?

(Question objected to and withdrawn.)

Q. I will ask you, Judge Staates, if you know of any location notice, of your own personal knowledge, within the Harris Mining District in which the parties followed the miners' rules and regulations in describing in particular the exact spot that the water was to be conveyed to and to be used?

A. I do not.

Q. You don't know of anyone who complied with the rules in that respect? A. No.

Q. You do know in 1888 that a portion of the miners who were in favor of keeping up the organization as an organization and keeping up the election of a recorder—that they were defeated in that project, don't you? A. Yes.

Q. And you know since that time there never has been any efforts of any kind or nature on the part of this so-called organization to carry out anything

(Testimony of Henry Staates.)

that it had originally promulgated?

A. Not that I know of.

Q. You were a member of the organization, Judge Staates, were you not—the miners of the Harris Mining District organized back in the '80's—were you a member of it?

A. Yes, I think at one meeting I was secretary.

Q. You were secretary for one term?

A. I think so.

Q. Where, if you remember, did Judge Williams keep the records of the recording district that he was recording for—that [1360—1210] is, created under Judge Dawson when he came here—where did he keep those records, and where was his office?

A. Well, I think the building is torn down now; at that time they used Mr. Willis' place, they had kind of a courthouse there, and held court there, and I think down the street there was a house fixed up later on.

Q. That is, Judge Williams, acting as United States Commissioner and ex-officio Recorder of the district formed by Judge Dawson occupied and used the place where court was held, did he not?

A. Yes.

Q. And he also, prior to 1888, kept the records of this miners' organization at the same place?

A. He did.

Q. You never were United States Commissioner and Recorder, were you? A. Yes, sir.

Q. What year were you United States Commissioner and Recorder?

(Testimony of Henry Staates.)

A. 1885—my recollection is—I came here in '84, and the next year I was elected recorder, after Colonel Dixon.

Q. What I mean, did you hold the position of United States Commissioner at any time and recorder of the Harris Mining District?

A. Yes; I was appointed United States Commissioner in 1884 by President Arthur; at that time the Commissioner was appointed by the President; the Organic Act provided for that.

Q. How long did you serve as United States Commissioner, then?

A. I think it was about a year and a half.

Q. Did Williams succeed you?

A. Yes, sir. [1361—1211]

Q. And when you were United States Commissioner you also kept the records of the organization called the Harris Mining District?

A. Yes; after I was elected recorder Colonel Dixon turned the records over to me.

Q. Now, you know, from keeping the records as recorder for the district which was formed under the law, and in keeping the records so far as the Harris Mining District was made, there was no distinction, so far as the records of the United States Commissioner was concerned, keeping any special set of books for one district and another set of books for another district? A. No; there was not.

Q. And the books you kept as United States Recorder, you simply recorded everything that was brought into you, no matter whether it was the Mon-

(Testimony of Henry Staates.)

tana Recording District or Harris Mining District, or whether it was from the country that was outside of those two mining districts?

A. As I said, in 1885 I made a location in Montana District, and West Wadelich was recorder, and they had records of their own, I think, up there; I don't know whether he ever turned them over to the commissioner or not; I couldn't say in regard to that.

Q. That was in the Montana District?

A. Yes; in the Montana District.

Q. You don't know whether the records of that mining district were turned over to the United States Commissioner or not?

A. I don't know; they were never turned over to me.

Q. What I mean is this, Judge Staates, when you were acting as United States Commissioner and ex-officio Recorder of the [1362—1212] district which was formed under the law, you didn't make any distinction in the records you kept—that is, with respect to the location of water rights that might come from the Montana Mining District or those from the Harris Mining District, or those that came from any district outside of those two districts—you made no distinction in the records?

A. None whatever.

Judge WINN.—That is all.

(WITNESS EXCUSED.) [1363—1213]

Mr. HELLENTHAL.—Your Honor, I have to offer in evidence a number of certified copies of water

(Testimony of Henry Staates.)

location notices, and these I refer to are copies of definite notices that have since been amended, and the first offer I make I will have marked exhibit No. 42 for identification. I now offer in evidence Defendant's Exhibit No. 42 for identification, which consists of a location of a water right made in the Harris Mining District by R. F. Lewis, in the year 1894; also of a certified copy of an amended notice made by the same party in November, 1897; both of these copies are certified to as correct by the United States Commissioner, keeper of the records.

(Whereupon water location notices were received in evidence and marked Plaintiff's Exhibits 42 to 61 both inclusive.)

Mr. HELLENTHAL.—I will offer in evidence the opinion of the Court upon the preliminary hearing of this matter.

(Offer rejected.) [1364—1214]

The plaintiff, to further maintain the issues on its part, recalled as a witness in rebuttal O. M. HARRI, who having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of O. M. Harri, for Plaintiff (Recalled in Rebuttal).

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You have been sworn, Mr. Harri?

A. Yes, sir.

Q. You know where the Ebner dam is?

A. I do.

(Testimony of O. M. Harri.)

Q. Were you up there in the vicinity of the Ebner dam on the 4th of October, 1910?

A. I was there on October 3d.

Q. You went up there on October 3d?

A. Yes, sir.

Q. Did you see the Ebner dam on the 3d of October? A. Yes, sir.

Q. Had the Ebner dam been cut at that time?

A. It had not.

Q. Was there any flume built in the vicinity of the Ebner dam at that time?

A. Not above my tent.

Q. I am speaking of the flume? A. No.

Q. Was there any flume anywhere above or below your tent? A. No.

Q. When did you first see the Ebner dam in October? A. October 3d, 1910. [1365—1215]

Q. At that time had the Ebner dam been cut?

A. No.

Q. The water was running over the top of it?

A. No, it was running through the old gate.

Q. And into the old flume?

A. Into the creek bed.

Q. At that time had there been a grade built for the flume line between your tent and the Ebner dam? A. No.

Q. Did you stay there continuously from that time on? A. Yes, sir.

Q. For how long a period?

A. From that time to New Year's day.

Q. Where were you living? A. In the tent.

(Testimony of O. M. Harri.)

Q. On what claim?

A. I don't know the name of the claim.

Q. Do you know whether it was on a claim that was claimed by the Alaska-Juneau at the time?

A. The Ebner Gold Mining Company claimed it—the Alaska-Juneau I should say.

Q. The Alaska-Juneau Company claimed it—you know that? A. Yes.

Q. When you say the Ebner Gold Mining Company, was that a misstatement?

A. I meant the Alaska-Juneau Company.

Q. When was work commenced on that grade—when did a crew go to work there, do you know, on the Ebner flume grade?

A. It was after the 6th of October.

Q. What did they put up there at that time?

A. I am speaking of the grade above my tent, between my tent and [1366—1216] the dam.

Q. There had been grading done below your tent?

A. Yes, sir.

Q. But not between your tent and the dam?

A. No, sir.

Q. What did they do there about the 6th of October?

A. Well, from that time on they was engaged in getting the dam through and grading and building the flume.

Q. What day was it they cut the dam, do you remember? A. I don't remember the exact day.

Q. About what time?

A. It was about, I should say, the 7th or 8th.

(Testimony of O. M. Harri.)

Q. Did you see them do that? A. Yes, sir.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. When did you first notice, Mr. Harri, the Ebner people working on any portion of their grade line which they afterwards put the flume over—that new flume?

A. They were working below my tent when I went up there.

Q. Below your tent—which way?

A. I mean, this way, towards town.

Q. You mean down the creek from where your tent was? A. Yes, sir.

Q. Now, don't you know, Harri, that when you were up there that they had cleared away all the brush and it could be distinctly seen from the Ebner dam just exactly where the grade of the flume, the high-line flume grade, that they expected to establish the flume upon, was—you could see that [1367—1217] plainly?

A. There was a little brush cut beyond my tent; there was no grading done—that is what I was speaking of, grading.

Q. You could distinctly see when you went up there to pitch your tent, the line that the Ebner Company intended to put its flume over, couldn't you?

A. Well, you might—there are so many claims crossing and recrossing in there, that you might call it a survey line or you might call it a flume line.

Q. You could see where it was cut out, and you

(Testimony of O. M. Harri.)

know it was cut out down below your tent, and it was cut out above your tent when you went up there on October 3d?

A. I could see lines around there; yes.

Q. You knew also the place where you pitched your tent was ground that was claimed, as you stated before, by the Ebner Company, didn't you—as a placer claim?

A. As far as my interpretation of it was, I thought they both were trying to claim the ground—I didn't know anything about the rights of it at all.

Q. Do you remember an incident up there, Harri, when our people were grading in order to make them turn the flume line around your tent that you went and laid right down across our grade so as to prevent them filling in, and so forth, and taking it along through your tent—do you remember that incident?

A. I have a slight recollection of it; yes.

Q. Now, then, don't you know, Harri, that prior to October 3d there had been an excavation made at the Ebner dam for the flume and the flume was afterwards placed in that excavation? A. No.

[1368—1218]

Q. It was not?

A. No; there was nobody around that dam doing anything when I came out there; if you will allow me, I will tell you just how things happened and how I remember.

Q. You just answer my questions—I am asking you whether or not they were excavating on the 3d of October at the dam, and whether any excavation

(Testimony of O. M. Harri.)

was made at the dam for a flume, on which a flume was afterwards put in, before you went there?

A. No, not at that time.

Q. Then, the testimony of Black, Murphy and Riordan—those witnesses are all mistaken about that, are they?

A. There is a chance for them to be; between September and October isn't very far; I was there on the ground, and one of my purposes was to look and see that that wasn't done; Mr. Kinzie came up on the 4th, and he and I walked the length of the left wing of the dam and there was no dam there at that time.

Q. You were sent up there at that time to stop the Ebner people from going ahead with their grade?

A. No.

Q. What did you throw your body across that flume grade for when they were grading it, then?

A. It was raining and it was pretty cold in that tent; I had a little stove about the size of that spittoon, and I got all wet and couldn't go out to work, and I thought if I could get thrown off by the other parties I would get to go back home and have a comfortable place to stay, and that is the object of my doing that.

Q. Now, then, you heard Mackay and Eli Black and Dan Riordan and Carlson all testify that this excavation for the flume was made there as early as September 14, and you think they are all mistaken, do you? [1369—1219]

A. Yes, sir; I heard that testimony.

(Testimony of O. M. Harri.)

Q. Do you say they are all mistaken? A. I do.

Q. Now, you heard their testimony also about there having been cut in the old Ebner dam, over where the present intake of the flume is,—that there had been a hole cut through there and that the water had been running through that into this excavation—you heard that testimony, did you? A. I did.

Q. You think they are all mistaken on that?

A. I do.

Q. You know, Harri, that Mr. Kinzie sent you up there to obstruct the Ebner Company, don't you, in building the flume and grade for its flume line and getting the water into the flume?

A. I think I have stated twice before that he had not sent me up there for that.

Q. Why did you lay yourself across the grade up there? A. I just told you a minute ago.

Q. You didn't do that because Mr. Kinzie had instructed you to do it? A. No, sir.

Q. You wanted our people to put you off up there, didn't you? A. I did.

Q. Did you do any work while you were up there in the tent on any mining claim there that the Alaska-Juneau Company claimed?

A. Across the road from the tent I cleared off possibly—

The COURT.—Now, just a minute, Judge Winn, how is that cross-examination?

Judge WINN.—I will withdraw the question; I think that is all. [1370—1220]

(Testimony of O. M. Harri.)

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Harri, was there any brush cut between your tent and the dam when you went up there?

A. I am not certain about brush being cut.

Q. You are not certain about whether there was brush cut or not? A. No.

Q. You know there was no excavation—no grading? A. No excavation and no grading.

Mr. HELLENTHAL.—That is all.

(WITNESS EXCUSED.) [1371—1221]

The plaintiff, to further maintain the issues on its part, recalled as a witness in rebuttal R. A. KINZIE, who having been previously duly sworn to tell the truth, the whole truth, and nothing but the truth, testified in answer to questions as follows:

Testimony of R. A. Kinzie, for Plaintiff (Recalled in Rebuttal).

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You have been sworn, Mr. Kinzie?

A. I have.

Q. Do you know where the Ebner dam is?

A. I do.

Q. Were you up there in the early part of the month of October, 1910? A. I was.

Q. What day in October were you there?

A. I was there the first time on October 3d.

Q. October 3d? A. Yes.

Q. How near the dam were you?

(Testimony of R. A. Kinzie.)

A. Oh, not very close to the dam on October 3d.

Q. You were close enough to see whether the dam had been cut or not at that time? A. No.

Q. When did you observe for the first time whether the dam had been cut?

A. On October 4th.

Q. How close to the dam were you that day?

A. I was on the dam. [1372—1222]

Q. Had the dam been cut at that time?

A. The dam had not been cut.

Q. You know where Harri's tent was at that time?

A. I do.

Q. Was there any grading between Harri's tent and the dam?

A. There was no grading between Harri's tent and the dam.

Q. When did you first observe any work of grading going on at that point?

A. Well, the first that I saw above Harri's tent was late in the afternoon of October 6th.

Q. October 6th? A. Yes.

Q. What was going on there then?

A. Why, the dam had been cut at that time, and there was a crew of men working, constructing boxes.

Q. The dam had been cut at that time?

A. The dam had been cut at that time.

Q. Were you present on the ground when the dam was cut? A. No, sir; I was not.

Q. You know where Harri's tent was situated?

A. I do.

Q. On what claim was that?

(Testimony of R. A. Kinzie.)

A. That was on the Russell claim.

Q. Who claimed the Russell claim?

A. The Alaska-Juneau Gold Mining Company.

Q. When was Harri sent up there?

A. On the morning of the 3d of October.

Q. What was he sent up there for, Mr. Kinzie?

A. He was sent up to represent the Alaska-Juneau Gold Mining Company and hold possession of our claims. [1373—1223]

Q. To which claims do you refer?

A. The Russell claim.

Q. What did he do up there?

A. He first pitched his tent and fixed up a place to live in and later he was engaged in doing assessment work on the Russell claim.

Q. Did he do anything in the way of fences?

A. Yes; he built two fences.

Q. When were they built?

A. They were built, I think, late in the afternoon of October 4th—that is, the upper fence was built at that time, and the lower fence, which is on the boundary between the Humboldt and the Russell, was built the next day.

Q. What were your instructions as to what he was to do—was he to use any violence to keep anybody off the claim?

A. Mr. Harri was instructed to keep off anyone from the claim, but he was particularly instructed not to use any violence; in fact, there were no fire-arms up there, no pistol or any other weapon that he could use.

(Testimony of R. A. Kinzie.)

Q. You saw to that?

A. Yes, I saw to that myself.

Q. His directions were to keep peaceable possession? A. They were.

Q. Now, do you know where the Alaska-Juneau dam was put in on the 3d of October? A. I do.

Q. Do you know at that time where the brushed out line was on the hillside indicating the position of the lower side line of the Lotta? A. I do.

Q. At what time was the first dam put in that the Alaska-Juneau [1374—1224] Company put in?

(Not answered because of objection.)

Q. Where was the dam built on the evening of October 3d—you have already testified to the construction of the dam there on the evening of October 3d, have you not?

A. I don't know whether I have in this hearing or not; I know I have previously testified to it.

Q. But anyhow, there was a dam built on the evening of October 3d?

A. The dam was completed on the evening of October 3d; the timbers and other material were put in the creek during the day of October 3d—started in the morning, the portion that I saw—it was about 10 o'clock in the morning of October 3d.

Q. How long previous to that time, if at all, had you been interfered with in your work up there—you have already testified about rolling rocks and things—when did that commence—that rock rolling?

(Testimony of R. A. Kinzie.)

A. That was some time about the middle or latter part of September.

Q. And was a continuous operation until after the 3d? A. It was; yes.

Q. Now, where was the dam built on the evening of October 3d with reference to the brushed out line of the Lotta?

A. It was built below the brushed out line—that is, down stream from the brushed out line.

Q. Was there ever any dam put in at any other place further up stream?

A. No; no dam at any other place except the position it was put in that day.

Q. The flume box that was put in that evening, you have testified [1375—1225] to putting in a flume or headgate at that time?

A. I rather think I did.

Q. Where was that flume and headgate put with reference to the brushed out line of the Lotta?

A. That was below the brushed out line of the Lotta.

Q. Did you ever put any flume or headgate above that place?

A. No; that was the only flume and headgate ever put in.

Q. Where was the dam put in on October 3d with reference to the point where the dam now is?

A. -At the same place.

Q. Where was the intake or flume and headgate put in on the night of October 3d with reference to the place where the flume and headgate now are?

(Testimony of R. A. Kinzie.)

A. In exactly the same place.

Q. Now, prior to the time that Judge Cushman's decision was rendered in the Basin case, what part of the dam extended over the line or on the Lotta Claim?

A. On the left-hand side of the creek there was an abutment or filling.

The COURT.—Right-hand side of the creek going up or going down?

A. It would be the right-hand side going down, the left-hand side going up; there was a filling in front of the portion of the dam, and a portion of this filling was above the lower side line of the Lotta as determined by Judge Cushman.

Q. The dam itself, the timber structure of the dam, where was that with reference to the lower side line of the Lotta prior to the decision?

A. The timber was always below the lower side line of the Lotta.

Q. Now, after the decision of Judge Cushman what change, if any, was made in the dam? [1376—1226]

A. The crib structure has been built on the left-hand side of the creek going up, and this is constructed by cutting hitches into the rock on either side, and logs are held in place in these hitches by vertical logs placed on the lower side; the filling of the old dam was then removed and then allowed to be carried downstream by the water, and filled in against the present left wing of the dam.

Q. After you made that change, was there any of the dam on the Lotta claim?

(Testimony of R. A. Kinzie.)

A. No; no portion at all.

Q. Are there any cross timbers that stick up under the ground on the Lotta claim?

A. No; there are no cross timbers in the dam.

Q. Now, Mr. Kinzie, do you know where the Ebner mine is? A. I do.

Q. Are you familiar with the Ebner mining property? A. I am.

Q. By whom is the Ebner mining property owned?

A. The Ebner Gold Mining Company.

Q. How long have they owned the property, do you know?

(Objection to question and question reasked.)

Q. Who owned the Ebner mining property in 1903? A. The Ebner Gold Mining Company.

Q. And from that time to the present time they have owned the Ebner mine?

A. They have, to the best of my knowledge.

Q. In 1903 did you make any examination of the Ebner mining property? A. I did.

Q. For whom and under whose directions did you make such an examination? [1377—1227]

A. The examination was made for Mr. F. W. Bradley.

Q. (By Judge WINN.) Who made the examination?

A. The examination was made by Mr. McDonald and myself for Mr. F. W. Bradley.

Q. (By Mr. HELLENTHAL.) Who was Mr. McDonald?

(Testimony of R. A. Kinzie.)

A. The General Superintendent of the Treadwell Company.

Q. You were at that time acting as Assistant Superintendent of the Alaska-Juneau Company?

A. I was.

Q. What did you find upon the property at that time in the way of a stamp-mill, a completed stamp-mill?

A. There was a 15-stamp mill located just below the lower tunnel on the Ebner property.

Q. On what claim, do you know—directing your attention to the Defendant's Exhibit "S," could you tell where that mill was located, on what claim?

A. On the Taku Lode—it is so marked here.

Q. What else did you find upon the property in the way of mill buildings?

A. There was a building constructed for a 40-stamp mill down Gold Creek, in the Canyon of Gold Creek, and situated on the Lotta claim.

Q. Where was that building with reference to the present intake of the Alaska-Juneau flume?

A. That building was above the present intake of the Alaska-Juneau flume.

Q. What was the character of the building that you found there?

A. Why, the construction and general appearance of the building, it was unmistakably a building for a stamp-mill,— for both a stamp and a concentrating mill.

Q. Both a stamp and concentrating floor were provided for [1378—1228] in that building?

(Testimony of R. A. Kinzie.)

A. They were.

Q. What did you find there in the way of an excavation?

A. There was an excavation on the lower side—that is, down-creek side of the building, that had been partially graded out at that time, and the hill-side above that grade had been cleared off at some time previously.

Q. What was the extent of that excavation?

A. The excavation was about 45 feet wide, by say 70 feet long.

Q. Was it such an excavation as would be utilized, or could be utilized in connection with the extension of the mill building that you then found upon the ground?

A. Yes, it was a necessary excavation for the extension of that building; I was informed that was what it was for.

Q. And not to serve any other purpose?

A. No; I think not.

Q. Now, Mr. Kinzie, are you familiar with the point at which the grade has been constructed since the year 1910? A. What grade?

Q. The Mackay grade, near the mouth of that new tunnel. A. Yes, I am.

Q. Are you familiar with the conditions surrounding that grade? A. I am.

Q. Are you familiar with the ground above it?

A. I am.

Q. Is that point such a point as, in your opinion

(Testimony of R. A. Kinzie.)

as an engineer, can be utilized as a site for a stamp-mill?

A. I consider it a most unsuitable place; in fact I think it would be criminal to put a mill there and allow anyone to work in it.

Q. I wish you would explain to the Court fully the conditions [1379—1229] above that point and surrounding that point, as a mill site.

A. The ground, that is, the mountain just back of the mill is all cracked and broken up; there are slides occurring at intervals of about two years—in fact, there was a slide came down last winter that cut off the point of the present grade; you can see it by standing on the grade itself; there are cracks two and three and four feet wide showing in all directions in the cliff just above the present site of the mill; that is one thing that would make it extremely dangerous for a stamp-mill to be placed there. Another reason why it is not a suitable place is because all that has been done is to dig out some loose earth from that old slide and throw this earth over the bank, and there is no provision made, nor do I think it is within reason to expect any suitable foundation for stamps to be placed on the site as graded out at the present time; it is nothing more nor less than a lot of loose dirt that came down in a recent slide.

Q. Could the grading that has been done there serve any useful purpose for legitimate mining operations? A. No; it could not.

The COURT.—Which grade do you mean?

(Testimony of R. A. Kinzie.)

Mr. HELLENTHAL.—That has been done at the portal of the tunnel.

Q. Could that grade serve any useful purpose in connection with mill operations?

A. I know of no use; over closer to the cliff they might put a building there and use it during the summer-time, but during the winter-time I think it would be exceedingly dangerous to have men working in the vicinity of Shady Bend.

(Whereupon court adjourned until 2 o'clock P. M.) [1380—1230]

AFTERNOON SESSION.

August 10, 1914, 2 P. M.

R. A. KINZIE, on the witness-stand.

Direct Examination (Cont'd).

(By Mr. HELLENTHAL.)

Q. Mr. Kinzie, I now call your attention to a photograph marked for identification Plaintiff's Exhibit No. 62, and ask you to look at it and state if you are familiar with the matters and things shown on that photograph? A. I am.

Q. Does that photograph show where the position of the grade is made under Mr. Mackay's directions, or the Ebner Company, or the California-Nevada Copper Company, in 1910?

A. No; the grade is just off this picture, to the right.

Q. What does the picture show, Mr. Kinzie?

A. It shows the large rock slide that occurred either in 1901 or '2.

(Testimony of R. A. Kinzie.)

Q. Where is that rock slide with reference to the grade at the portal of the Ebner tunnel or the California-Nevada Copper Company tunnel?

A. It is just a short distance down the creek from the grade, near the portal of the Ebner tunnel.

Q. When did that slide occur?

A. About 1901 or '2.

Q. Is that picture a correct representation of slide? A. It is.

Mr. HELLENTHAL.—I offer that photograph in evidence.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 62.)

Q. I now call your attention to another photograph, marked for [1381—1231] identification Plaintiff's Exhibit No. 63,—are you familiar with that picture? A. I am; yes.

Q. What does that picture represent?

A. It is a photograph taken in the Jualpa Basin, showing Shady Bend and the large rock slide as shown in exhibit No. 62, that occurred in 1901 or '2.

Q. Does it also show the point where the grading for the Ebner mill was made by Mr. Mackay in 1910 or '11? A. It does.

Q. Will you mark that point on that photograph, please—write on it the words “mill grade”?

(Witness does so.)

Q. Does that photograph also show the ground immediately above the slide and above the mill grade? A. It does.

(Testimony of R. A. Kinzie.)

Q. What are the indications at that point with reference to the slide?

A. In the upper left-hand corner of the photograph it shows the cliff of rock just north of the slide which occurred in 1901, and adjoining these are the cliff and rock that I referred to in my testimony this morning.

Q. Those are the broken cliffs? A. Yes.

Q. Were they in that condition in 1910?

A. They were.

Q. Prior to August 1st? A. They were.

Q. And that shows the conditions correctly upon the ground as they are? A. It does.

Mr. HELLENTHAL.—I offer that picture in evidence. [1382—1232]

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit No. 63.)

Q. Now, Mr. Kinzie, what is the character of the mill site on the Lotta, as to whether or not that is a good mill site, or not a good mill site?

A. I consider it a good mill site.

Q. Now, the Ebner tunnel that has been driven into the ground, the portal being a short distance above the Mackay grade, would that be a useful tunnel or a proper tunnel for use in connection with a mill located on the Lotta claim? A. It would; yes.

Q. Just as useful in connection with a mill there as it would be for a mill at Shady Bend? A. Yes.

Q. I wish you would explain that to the Court so the Court will understand it?

A. To explain it I would have to assume there was

(Testimony of R. A. Kinzie.)

a mill going in at Shady Bend, and I believe all the testimony so far is there has been an excavation made there for a mill. If there was a mill there the ore would have to be lifted to the ore bins. Now, if the mill was put in at the point originally selected for the mill site, on the Lotta claim, you would have to lift the ore from the present tunnel to get it in the mill, in a similar manner as at Shady Bend—that is, at both places you would have to lift it by putting a short upraise from the present tunnel to the Lotta mill site.

Q. It wouldn't make any practical difference where the mill was situated, as far as the tunnel was concerned?

A. No, not as far as the tunnel is concerned.

Q. Now, on the 1st of August, 1910, did you or your company or anyone that you had in your employ or that was connected with the Alaska-Juneau Company, know that Mr. Tripp had [1383—1233] posted a notice at the Ebner flume, or any other place, appropriating the water?

A. I had never heard of any such notice.

Q. When was the first time, Mr. Kinzie, that you heard of it?

A. Sometime during the month of October, I think, of 1910, was the first I heard of the Tripp notice.

Q. On the 1st day of August of thereabout had you any knowledge of any claims of Mr. Ebner or any of his associates in the Ebner Company concerning any of these properties lying below the Lotta claim?

A. No; I had not.

(Testimony of R. A. Kinzie.)

Q. When did you first get any knowledge of any of those things?

A. I think it was in either the latter part of August or September, I think, that Mr. Bent told me he was going to do some work up there; that is the first I knew that he was connected with it.

Q. When the notice was posted on the 1st of August, 1910, did you have any knowledge—

A. Just one minute, Mr. Hellenthal—I think before that time I did receive a telephone message from Mr. Bent, asking me in regard to the Harri cabin that had been built on the Oregon claim, asking me if that belonged to us and he asked me on what claim it was; I told him on the Oregon claim, and asked him why, and at that time he said he would come over to see me; I think that is the first I knew of Bent having anything to do with it.

Q. About when was that, Mr. Kinzie?

A. That must have been during the month of September some time.

Q. 1910? A. Yes, sir.

Q. Now, on the 1st of August, 1910, had you any knowledge or [1384—1234] information or did you know of any property—any other mining property—further down the creek than the lower side line of the Lotta? A. I did not.

Q. You made an examination of this property in 1903, I think you said? A. In March, 1903.

Q. At that time did you have any conversation with any officer of the Ebner Gold Mining Company with relation to the future plans of that Company?

(Testimony of R. A. Kinzie.)

A. I did; yes.

Q. With whom?

A. With Mr. B. L. Thane—he was superintendent then.

Q. Who was Mr. B. L. Thane at that time?

A. He was superintendent of the Ebner mine.

Q. That is the mining property belonging to the Ebner Gold Mining Company? A. Yes.

Q. Now, I will ask you what that conversation was?

(Not answered because of objection.)

Mr. HELLENTHAL.—I offer this testimony for the purposes of showing that in 1903 the witness made an examination of the Ebner property; that Mr. B. L. Thane, who was then superintendent in charge of the Ebner Company, explained the future plans of the Company, which consisted of building a stamp-mill on the Lotta claim at the point marked on exhibit No. 1 “New Ebner Mill and Excavation for Enlargement,” and using the water at that point, and turning the water back into the creek on the said Lotta claim; that this was one of the inducements that led the Alaska-Juneau Gold Mining Company to locate this water at the point where the Alaska-Juneau dam [1385—1235] is now—that is, with the view of taking it out of the creek after the same had been returned to the creek by the Ebner Gold Mining Company in connection with its operations.

Q. I will ask you, Mr. Kinzie, what that conversation was?

(Question not answered because of objection.)

(Testimony of R. A. Kinzie.)

Q. When were the active operations of the Ebner Company discontinued, Mr. Kinzie; how long after 1903?

A. I think they ran for, either one season or two seasons, I don't remember.

Q. After that? A. Yes.

Q. And after that active operations on the property were discontinued?

A. Something like that, yes; I won't be positive as to the exact operations of the company—it was either in 1904 or '5 that the actual operations discontinued.

Q. Had you any information in August, 1910, concerning any enlarged mill construction and mine development of the Ebner Company contemplating a large mill, other than that connected with the construction of an enlarged mill on the Lotta claim?

A. I had not.

Q. I hand you here a map that occurs on Page 81, which is entitled "Sketch Map of Gold Creek" contained in the United States Geological Report for the Juneau Gold Belt, and I will ask you if you are familiar with that map, and if that shows the general conditions as they existed on the ground in 1903 and 1910, at the time the Mulligan notice was posted?

A. I am familiar with the sketch, and also know that it does correctly show the conditions as they existed at the time.

Mr. HELLENTHAL.—I offer that map in evidence. [1386—1236]

(Whereupon said map was received in evidence and marked Plaintiff's Exhibit No. 64.)

(Testimony of R. A. Kinzie.)

Q. Mr. Kinzie, were you familiar with that map, which was offered in evidence, at the time you made that location in 1910? A. I was.

Q. And some time prior to that? A. Yes.

Q. Now, have you made a calculation as to the water requirements to furnish the power that Mr. Muir has testified to was necessary in connection with his development work—you heard Mr. Muir's testimony? A. Yes.

Q. Do you remember what the water requirements would be as measured in horse-power?

A. I believe Mr. Muir testified for 464 horse-power.

Q. 464 horse-power? A. Yes.

Q. Do you know what head they have at that compressor? A. 427 feet in my recollection.

Q. At 427 feet, Mr. Kinzie, how many miner's inches of water would be required to supply the power as measured in horse-power for their requirements, according to Mr. Muir's testimony?

A. Approximately 580 miner's inches.

Q. 580 miner's inches? A. Yes.

Q. Now, Mr. Kinzie, when did you first apply the water to use on the mill site—I am speaking now of the mill site above Gastineau Channel, the place where the milling plant is under construction?

A. By applying it to use I mean the actual using of the water, [1387—1237] was started on June—on June 22d, 1913, and this is answering your question at the place where the present stamp-mill is being constructed.

Q. That is on the mill site above Gastineau Chan-

(Testimony of R. A. Kinzie.)

nel, on the Gastineau Channel shore? A. Yes, sir.

Q. What was the use to which the water was put to at that time?

A. The water was first used for sluicing off and grading the site for the present stamp-mill—hydraulicking.

Q. What proportion of the capacity of the flume was used in that connection?

A. The full capacity of the flume was used for that purpose.

Q. Is that a use in connection with mine operations? A. Yes; a very essential use.

Q. I wish you would explain to the Court just how that water was used—all about it.

A. Before the water was used for sluicing, gates had been cut in the side of the flume above the proposed grade for the first unit of 150 stamps; the water was then turned through these gates one after another, and the dirt, rocks, stumps, and debris of all descriptions was washed down the hillside, thus exposing the rock in place so that the work of installing the foundations for the stamp-mill and the machinery contained therein could be continued; while this work was going on a pipe-line was extended from the end of the flume to the piles of debris and dirt at the foot of the cliff, and that was afterwards washed away by the use of a giant and by continuing the ground sluicing.

Q. Your mill construction, I think, you have already testified is still in process of construction—your milling plant? A. It is; yes. [1388—1238]

(Testimony of R. A. Kinzie.)

Q. And the mill that is now up, the experimental mill of 50 stamps, is on a part of the ground that was then being washed out? A. Yes.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. What time was it, Mr. Kinzie, in 1903 that you, in company with some one else, made an examination of this Ebner property for Mr. Bradley?

A. I think it was March.

Q. What period of time did this examination extend over?

A. Why, I think the examination took from about two to three weeks—two weeks anyway; I don't remember the exact time.

Q. Who did you say was with you?

A. Why, I had a number of men—had a crew of samplers; Mr. Tappen did the surveying.

Q. Did you make any underground, as well as surface, examinations? A. I did.

Q. And you had a number of men—what was the highest number of men you had at any one time with you, Mr. Kinzie, when you were making this examination?

A. Let me see—there were two samplers—the highest number of men would be 15 or 20—maybe not that number—maybe a little less.

Q. You would naturally, in examining that property, make reports of what you found, and sample the surface ground and the underground too, wouldn't you? A. Yes.

(Testimony of R. A. Kinzie.)

Q. Do you remember if Mr. Ebner was here at the time that examination [1389—1239] was made?

A. I think he was not.

Q. Did Mr. Bradley procure the consent of some one, or did you procure the consent of some one of the members of the Ebner Company to make this examination?

A. I understand Mr. Bradley had the examination made at the request of Mr. Ebner.

Q. You had nothing to do with that part of it, Mr. Kinzie? A. No; I had not.

Q. Now, speaking about Harri, he assisted you on the flume line and the work that was carried on at the point below where your present dam is up until the 3d day of October, 1910, didn't he?

A. From August 1st to October 3d, 1910.

Q. And then you sent him up on the place where he erected his cabin, up near the Ebner dam, on October 3d?

A. Where he pitched his tent, yes; there is no cabin built there.

Q. Now, then, you say you sent him up there to pitch the tent on some mining claim that your company claimed to own—what do you say the mining claim is? A. The Russell.

Q. That is the lode claim that was located for your company some few days before Harri went up and pitched his tent on it, was it not?

A. Well, let me see—that claim was located—

Q. Located in September, 1910—the latter part of September?

(Testimony of R. A. Kinzie.)

A. Yes, September, I think it was.

Q. Who located that claim, Mr. Kinzie?

A. I don't remember.

Q. It was located, however, for your company, wasn't it?

A. It was located for the Alaska-Juneau Company; yes. [1390—1240]

Q. You don't remember the party who located it?

A. No.

Q. At whose instigation was it located—was it yours or Mr. Bradley's?

A. I don't remember at this time, but I think it was at mine.

Q. You found what you supposed to be a vacant piece of mineral ground, then you put this location over it? A. Yes, sir.

Q. How came you to find that at that time, Mr. Kinzie—did you make an examination of plats and maps, or did you examine the records here in the Juneau recording office to ascertain whether there was a vacant piece of ground up there?

A. I think both things were done.

Q. Didn't you find on record a location on this same ground, or part of the same ground, on which you put your location?

A. I don't remember that we did; in fact, I didn't know of the placer fraction, I think, until—it was the night of October 6th.

Q. October 6th?

A. Yes; the first I knew of it Lloyd Hill told me about it.

(Testimony of R. A. Kinzie.)

Q. Now, there are two ways to find out about vacant ground—you claim you have a map or plat showing all that property up in that part of the country?

A. We have.

Q. You would either have to go on the ground to find out if there was a vacant piece of land, and observe whether there were any stakes, or you would have to go to the recorder's office and find out whether or not that ground has been located, wouldn't you?

A. Yes.

Q. You know there was a location notice on this same ground—[1391—1241] you have since ascertained that, have you not?

A. Yes; I have heard Mr. Ebner testify, I think, that since that time the location has been put of record.

Q. Oh, you think there has been a location notice of the placer claim put of record since September 10th?

A. That is my understanding—I might be wrong.

Q. Don't you know that location is in evidence here, Mr. Kinzie, and shows it has been of record for a great many years?

A. I heard Mr. Ebner testify that it had, but as to my own personal knowledge, I don't know.

Q. But it is in evidence and you have examined it, haven't you?

A. No; I haven't examined it—you are speaking now with reference to the placer claim?

Q. Yes; a placer claim over which the Russell claim is located partially. A. Yes.

(Testimony of R. A. Kinzie.)

Q. Now, then, that claim was located in 1910, and you know, as a mining man, that there was not any necessity of doing any assessment work on that claim that year, don't you—the first year you located?

A. Yes; at that time it wasn't necessary to do any assessment work.

Q. What do you mean that you put Harri up there in possession of it?

A. We had had some experience along the line of holding possession of ground; on the morning of October 3d Harri was sent up there and given instructions to prevent any one from taking possession of that ground, but not to use force of any nature, and I took it upon myself to go up and see that there were no arms that he could get to use force with.

Q. You simply told him to gently but firmly go up there and hold [1392—1242] down a quartz lode claim that you had located in September prior to the time you sent him up there? A. I did.

Q. That is, you wanted him to prevent the Ebner Gold Mining Company from building a flume line across that piece of property, didn't you, Mr. Kinzie?

A. That was one of the purposes.

Q. Now, then, Mr. Kinzie, you knew as early as the latter part of August, anyway, in 1910, that the Ebner Gold Mining Company was claiming the right to take the water out of Gold Creek up there at this old dam, and take it down and use it for some purpose, did you not?

A. The first I knew was a notice that was posted by yourself, and I think it was signed by you; I don't re-

(Testimony of R. A. Kinzie.)

member what time I learned of that, but, of course, it must have been sometime after you posted it.

Q. Don't you know that there was a suit commenced—you have offered a complaint in here showing a suit was commenced by the Ebner Company against your company in August, 1910?

A. Yes; that was a suit to enjoin us from taking water out of Gold Creek below—

Q. And this complaint that you have offered in evidence, do you know whether or not that is the complaint that covered the facts indicating to you that we were going to take that water and use it for some purpose, or have you seen this complaint?

A. Yes; I have seen the complaint, and my recollection of that complaint is that it referred solely to the work that we were doing below the new mill of the Ebner Company and on Gold Creek in the vicinity of the Lotta Claim.

Q. Well, the complaint will show for itself, Mr. Kinzie. [1393—1243] A. Naturally.

Q. Now, you didn't have any conversation with Mr. Bent in September, 1910, did you?

A. It was a day or two before he left.

Q. Don't you know that Mr. Bent left here in the early part of August?

A. No, I don't know that; that is, I don't remember it at this time, I couldn't fix the date that Mr. Bent left Juneau.

Q. Don't you know that Mr. Bent left here some time between the 5th and 10th of August, 1910?

A. No; I don't know that.

(Testimony of R. A. Kinzie.)

Q. Well, if he did leave here at that time, your conversation with him would have been in August, would it not—he didn't come back again in September?

A. I don't know whether he came back in September or not; yes, I am quite sure it was the first trip that he was here that the conversation took place.

Q. Don't you know that Mr. Bent didn't make but one trip here in 1910, Mr. Kinzie?

A. No, I don't know that.

Q. Now, don't you remember in the other case that you testified that these conversations that you had with Bent were in August?

A. If I did so testify, why, the thing was a great deal fresher in my mind then than it is now; I haven't attempted to remember what time Mr. Bent was here.

Q. Now, then, you say that on the 4th day of October, 1910, that Mackay and his party had not cut an opening in the Ebner dam about where the new flume was afterwards constructed, and now takes the water from the dam? A. I so testified, yes. [1394—1244]

Q. You say positively, do you?

A. I say it positively, yes.

Q. That positively on the 4th day of October that there wasn't any opening in the Ebner dam near where the present intake of the new flume line is, and the water was not running out into a ditch there through that opening—you swear to that, do you?

A. I absolutely swear to that.

(Testimony of R. A. Kinzie.)

Q. You do?

A. Yes; there is no question about that.

Q. You absolutely say there was no ditch of any kind whatsoever at this particular point on October 4th, 1910?

A. I am absolutely positive about that.

Q. Then, those witnesses that testified concerning it are mistaken, are they?

A. That is the only thing I can say, yes.

Q. Now, Mr. Kinzie, what did you say that this dam that you put in on the 3d of October, 1910, in Gold Creek consisted of? A. What it consisted of?

Q. Yes.

A. Well, in the first place, starting on the left-hand bank of the stream, going upstream, we had blasted out a number of boulders that were lying next to the bank—

Q. I don't mean particularly about the blasting out of the boulders—of what logs or brush did it consist—of how many logs?

A. My impression is that it was three logs.

Q. Well, you heard the testimony of several of your witnesses that testified that there were two logs put in there—are they mistaken on that point?
[1395—1245]

A. They could be very easily mistaken whether it was two, three or four logs.

Q. Do you want to swear positively that there were more than two logs there?

A. As to there being three logs, I am practically sure—yes, as to the three logs.

(Testimony of R. A. Kinzie.)

Q. Then, these witnesses of yours that put these logs in there and walked across on them to help swing around a piece of flume are mistaken, are they—there are more than two?

A. I don't know that they all testified that there was two—by referring to that photograph, I think the photograph distinctly shows three logs.

Q. You mean some photograph you took up there on the morning of the 4th? A. Yes, sir.

Q. You think the photograph shows three logs?

A. Yes.

Q. Now, you say it contains three logs—now, what else did it contain?

A. We had some driftwood, and also some lagging or logs had been run across from one bank to some rock or large boulders and put a little to the left-hand of the center of the stream going up; the logs were then hitched between these two large boulders at that point, and that formed the first section of the dam, from the left-hand bank to the rocks going upstream; in front of the lagging we cut brush along the sides of the Jualpa flume and placed the brush in front of the logs and lagging, and piled loose boulders and dirt and heavy material on top of the brush to keep it in place, and so as to turn the water from that side of the creek to the left-hand side of the creek, and also help to [1396—1246] raise the level of the water.

Q. Now, Mr. Kinzie, I think you testified this morning when Mr. Hellenthal was questioning you about the dam as it existed before Judge Cushman's

(Testimony of R. A. Kinzie.)

decision on what is known as the Basin case—now, then, isn't it a fact, Mr. Kinzie, that after Judge Cushman tried that case that you did put the piling—you took the part of the dam that is on the left-hand side of the creek as you go up the creek and you moved the logs and the dam proper several feet down the creek, and by thus doing so left kind of an apex in the center of the creek, and that that apex, at some stages of the water would cause part of the water to flow over on the left-hand side of the creek as you go up, and part of it to lead down into your intake—now, didn't you do that work after Judge Cushman's decision in that case?

A. No; the work was not done as you described, Judge.

Q. Now, that is all I want to know.

A. No; I cannot say to your whole question that that is the way that we did the work—the shape of the dam is very much the shape that you describe.

Q. Now, didn't you hear the testimony of Mr. Lindsay and Mr. Stewart, testifying that that part of the dam which was on the left-hand side of the creek as you go up was moved several feet down the creek, and that is what caused the apex—didn't you hear that testimony to that effect?

A. No; their testimony was not to that effect.

Q. You didn't hear them testify?

A. Yes; I heard them testify.

Q. You didn't hear them testify to that effect?

A. Not the way you describe it.

Q. Didn't hear Mr. Stewart testify that in his

(Testimony of R. A. Kinzie.)

judgment that part of the dam on the left-hand side of the creek [1397—1247] had, after Judge Cushman's decision been moved several feet down the creek, but he didn't give me the exact number of feet? A. Yes.

Q. Then you heard Mr. Lindsay also testify that that had been done, didn't you, and had formed an apex in the middle of the creek by the changes you made in the dam—the changes you made according to the decision of Judge Cushman.

A. Yes; that part is quite true.

Q. Now, then, Mr. Kinzie, you say it would be criminal for anyone to construct a mill upon the location at the place that Mackay has made an excavation for a mill—Mackay assisted in building a good many of the mills over at the Treadwell mines, did he not? A. He assisted; yes.

Q. Do you want to testify to the Court that your mills over there all have a foundation on bedrock?

A. The stamp batteries?

Q. Yes.

A. Absolutely so.

Q. Don't you know that there is a part of your 240-stamp mill that is not built on bedrock, but is built on ground that is much less adapted to building a mill site than the place that Mackay graded off?

A. No; it is not.

Q. You testify positively, then, Mr. Kinzie, that the foundations for your stamp-mills, all that are built over at Treadwell, are built on bedrock?

A. On bedrock.

(Testimony of R. A. Kinzie.)

Q. On bedrock absolutely? A. Yes. [1398—1248]

Q. Now, don't you know, Mr. Kinzie, that this slide that you are talking about that took place some years ago, in 1901, don't you know that slide never touched anywhere near the foundation that has been excavated by Mackay for the mill?

A. There is a portion of that slide, I think, within 50 feet of the foundation as excavated; there was a slide last winter that came over a portion of the ground he has excavated.

Q. You are sure of that? A. Yes.

Q. Absolutely sure of that?

A. Absolutely; I have been over it a number of times for that purpose.

Q. Isn't the timber that is standing above this mill site just about as old-looking timber as is standing above your mill site over here? A. Yes; it is.

Q. There is timber there as much as probably eight or nine hundred years old? A. I wouldn't say.

Q. There is old timber there?

A. Yes; there is old timber there.

Q. There could be a slide within 50 feet of the mill and the mill be perfectly safe, couldn't there?

A. If it came within 50 feet?

Q. And the mill be perfectly safe?

A. If it didn't hit the mill, it would.

Q. You know down here in that gulch, between here and Sheep Creek you spanned a place there where there has been a slide every winter with your high-power wires, and you have put your transmis-

(Testimony of R. A. Kinzie.)

sion power lines along there, haven't you? [1399—1249] A. Yes, we got over the top of it.

Q. It depends on the topography of the ground, and what there is there to sheer it off, as to how far there is any danger from those slides?

A. That is two different things—a span of two or three wires, and a mill are two different things.

Q. I know, but the slides would carry out your towers the same as they would a mill, wouldn't they?

A. Our towers are not in the line of the slide at all.

Q. I know, but they are within a very few feet of it.

A. They are not in the line of the slide, though.

Q. Is the slide so well defined that you can tell when you are in the way of it?

A. Oh, yes; the slides are very well defined.

Q. And whenever there is some earth and the topography is such that it sheers the slide off, you can build very close to the slide and be safe, can't you?

A. Oh, yes.

Q. I will hand you this photograph, Plaintiff's Exhibit No. 62, and ask you when that photograph was taken?

A. Why, Judge, it was taken some time ago, I don't know the exact date.

Q. Don't you know from the looks of that picture, that it was taken shortly after 1901, after that slide, wasn't it, Mr. Kinzie?

A. It must have been taken a very short time after the slide.

Q. From whom did you get it?

(Testimony of R. A. Kinzie.)

A. I didn't get it; I don't know who it came from.

Q. You identified it as showing the conditions up there, at what time?

A. No particular time, as far as that slide goes, from 1901 to [1400—1250] the present time.

Q. Don't you know it is all grown over there, Mr. Kinzie, and you couldn't get a picture for several years last passed?

A. There is some grass growing there.

Q. There is nothing in this that looks like a fresh slide to you over there, is there? A. Oh, yes.

Q. So far as that is concerned, Mr. Kinzie, most of the earth on these sidehills here comes down near the surface, and there have been slides at one or another on most every one of these mountain sides?

A. You mean at the foot of the hill?

Q. Yes. A. Oh, yes; more or less.

Q. I didn't understand you, Mr. Kinzie, just what you said exhibit No. 63 was, and this rectangular figure that you have marked in red, and also have some name there—what did you intend that rectangular in red to represent?

A. That arrow at the "mill site" shows the grade of what you call the Mackay foundation—that is the approximate position as far as the photograph could show it.

Q. Have you been all over the ground on Cape Horn No. 2 lode claim, on the lower side of it—what represents the lower side line, and all over the Cape Horn claim to ascertain whether or not there are a great many places there you could build a mill?

(Testimony of R. A. Kinzie.)

A. On the Cape Horn No. 2?

Q. Yes, sir,—that is where the present mill site is graded off that you have been testifying concerning.

A. Yes; there is a possible chance on that claim to build a mill.

Q. Did you hear Mr. Tripp's testimony that the place he concluded [1401—1251] to build the mill was just a little further around the bend there than where the present grade is?

A. I think he testified that the place he had chosen was close to where the present stamp-mill is.

Q. And that is in the vicinity there, isn't it?

A. It is further up stream; yes.

Q. Now, don't you know that the big air-compressor which the Ebner Company has caused to be installed, has been installed on this foundation that was graded off by Mackay for a mill? A. I do.

Q. Do you know anything about how far they had to excavate there to find solid earth so they could construct the air-compressor?

A. To the best of my knowledge they haven't got any solid earth.

Q. What do you know about it?

A. I saw the excavation at the time it was being made—I didn't see it when it was finished.

Q. That is a pretty big air-compressor, isn't it?

A. No.

Q. Not a big one? A. No.

Q. Do you know anything about what sort of a foundation they had to put in there for it?

A. They put in a concrete foundation for it.

(Testimony of R. A. Kinzie.)

Q. Do you know whether or not they have a good substantial foundation there?

A. I think very likely they have.

Q. Did you put in any concrete foundation in the building of any of your mills across the way at Treadwell?

A. That is rather a broad question; do you mean for stamps or do you mean for compressors? [1402—1252]

Q. I mean for either one.

A. You can put a compressor on sand if you want to, but you cannot put a stamp on sand.

Q. What about the mills over there?

A. Used concrete foundations over the solid rock.

Q. You are positive about that on all your mill sites over there, are you?

A. No; we have some wooden foundations.

Q. Were you at Treadwell when those foundations were laid for all those mills? A. No; I was not.

Q. You don't know anything about what is underneath those foundations—you haven't been under there and cannot tell what it is of your own personal knowledge?

A. I have seen all of the footings of every battery at Treadwell with the exception of the foundations say for 16 stamps at the lower end of the 240 mill.

Q. You haven't seen that?

A. No; that is about 25 or 30 feet down under the ground.

Q. You have now no personal knowledge of what was found underneath the foundations that they have

(Testimony of R. A. Kinzie.)

constructed over there?

A. You mean that I actually saw?

Q. Yes.

A. No—that is, in regard to this 16 stamps at the end of the 240 mill; I have seen every other foundation on the island.

Q. Now, then, Mr. Kinzie, when you say to Mr. Hellenthal that you didn't know on August 1st, 1910, of the Ebner Gold Mining Company owning any property lower down the creek than the lower side line of the Lotta claim—you testified to that, didn't you? A. Yes.

Q. Now, aren't you mistaken about that, Mr. Kinzie? [1403—1253] A. No.

Q. Didn't you, when you were patenting the Colorado lode claim, deed to the Ebner Company all of that portion that is included on Defendant's Exhibit "S" here, of the Colorado that was in conflict with the Parish No. 1 claim? A. We did.

Q. Is that lower down than the side line of the Lotta? A. Yes.

Q. And it is right near where you have constructed your air-compressor at Snow Slide gulch, isn't it?

A. Oh, no; it is away up on the hillside from that.

Q. What is the length of the Colorado claim?

A. The Colorado claim is about—the way it is cut off now—about 1200 and some odd feet.

Q. How much of the Colorado is below the portion which your company deeded to the Ebner Company, approximately?

A. About 450 feet according to this map.

(Testimony of R. A. Kinzie.)

Q. You say your air-compressor and new tunnel are about 450 feet below the lower side line of the Parish No. 1 lode claim?

A. Well, I wouldn't say that; I would say that when that compromise agreement was made, they threatened to adverse us and give us trouble at the time we went to patent, and that was the compromise under which we deeded to them a portion of the Colorado claim that they then claimed was a part of their Parish claim.

Q. Then, when you verified the reply in this case and said that the Ebner Company did not own any property down the creek any lower down than the Lotta claim, you were mistaken about that—this part that the company deeded is lower down the creek, isn't it? A. Yes.

Q. Then, if you have stated in your reply that the Ebner Company [1404—1254] didn't own anything lower down the creek than the Lotta, you are mistaken, aren't you?

A. That particular piece of ground I didn't have in mind; I didn't think of that at the time; I had overlooked that piece, and that was omitted from that reply.

Q. Now, then, you were talking about there being a good mill site, and so forth, on the Lotta lode claim; in 1910 you caused to be filed over this Lotta lode claim two mining claims, one called the Canyon and one called the Oregon, didn't you? A. Yes, sir.

Q. And those two claims took up most all of the

(Testimony of R. A. Kinzie.)

Lotta lode claim as it was established by Judge Cushman, didn't it?

A. As established by Judge Cushman?

Q. Yes, sir.

A. Yes; I think they did—that is, the full claim was covered; yes.

Q. Then, if the Ebner Company had a good mill site on the Lotta lode claim to build a mill on your company was trying to wrest from them most all of the Lotta claim in 1910, weren't you? A. No.

Q. You were not? A. No.

Q. You were claiming it by two locations, weren't you?

A. When you make a location, you always run it out, even if you are locating a fraction, you run it out full length.

Q. In the trial of that case didn't you people try to cut the Lotta claim clear out of existence, and claim you owned that ground by reason of your two claims, the Oregon and the Canyon claim—didn't you make that claim, and didn't Cushman pass upon that?

A. No; I think not; we never claimed the Lotta claim by any means. [1405—1255]

Q. Didn't you put in an exhibit that has been offered in this case, and don't you know that your Canyon lode claim and your Oregon lode claim that you were claiming to own in that suit, and claiming the ground under them, covered almost all of the Lotta lode claim? A. I think they did.

Q. Now, Mr. Kinzie, when you were up there ex-

(Testimony of R. A. Kinzie.)

aming that property and making surface ground examinations and underground examinations, in the expectation of Mr. Bradley purchasing that property, didn't you then in 1903 when you were making your examination, become perfectly well acquainted with the boundary lines of every one of those claims up there? A. No.

Q. Then do you want to say when you go as an expert to examine a piece of property that you don't examine the boundary and surface lines of that property as well as you do the workings underground?

A. The purpose of that examination was a two-fold purpose.

Q. Didn't you testify that your examination was for the purpose of Mr. Bradley buying it?

A. That is what it was made for.

Q. Now, do you want to state to the Court that you didn't examine that property—the surface ground as well as the underground? A. Yes.

Q. You didn't do it? A. No; I didn't do it.

Q. I believe you say it is not customary in the examination of property for a prospective buyer to examine the surface ground as well as the underground workings before you make up a report? [1406—1256] A. Oh, yes.

Q. You made up a report on this property, didn't you? A. I did.

Q. Now, you spoke something about that it might be practical for the Ebner Company to go down on the Lotta lode claim and mine their property through their new tunnel which they have driven?

(Testimony of R. A. Kinzie.)

A. I think that is what the tunnel is driven for, Judge.

Q. You think that the tunnel that the Ebner people have driven, commencing at Shady Bend, in your opinion was driven for the purpose of mining the property through a mill or by means of a mill upon the Lotta claim? A. No, no.

Q. I thought you said so. A. No.

Q. Is it as practical to work the property of the Ebner Company with a mill located on the Lotta claim as it would be with a mill located down near Shady Bend? A. Positively more so.

Q. You think in your opinion that it would be positively more so? A. Oh, yes.

Q. And you could utilize this new tunnel just as well in the mining of the property with a mill on the Lotta lode claim as you could with a mill down this side of the mouth of the tunnel, could you?

A. Considering the present conditions, yes.

Q. Do you know how far they would have to raise the ore if the mill was put on the Lotta lode claim?

A. Yes.

Q. How far? [1407—1257]

A. About 160 feet.

Q. They would have to lift it about 160 feet?

A. No; they would have to lift it a little more than 160 feet—might have to lift it 200 feet.

Q. Lift it 200 feet, providing the ore is taken out on what level, or from what place?

A. Any place that the tunnel tapped.

Q. Any place that the tunnel tapped?

(Testimony of R. A. Kinzie.)

A. Yes.

Q. But you don't mean they would not have to lift it a great deal further if they sunk shafts down from the bottom of this tunnel and were working below the level of the tunnel, do you, supposing they did work below the level of the tunnel? A. Yes.

Q. Then they would have still further to raise it, would they not?

A. The further they go down the further they would have to hoist it; yes.

Q. According to your estimate, if they worked this property from the present new tunnel in a mill at Shady Bend, how much would they have to lift the ore then, providing they didn't go any further down than the level of the bottom of the new tunnel?

A. If you make that assumption, Judge—there is no reason to expect that they will ever put a mill on that foundation—and I am quite sure they never expect to put a mill there; but assuming that they did, they would have to lift it about 40 or 50 feet.

Q. What head of water would there be if a mill was constructed on the Lotta claim? [1408—1258]

A. 240 some feet.

Q. 240 feet? A. Yes, I think so.

Q. There would be that much of a head of water if a mill was constructed on the Lotta lode claim?

A. Yes.

Q. How much head would there be, if a mill was constructed down near the new tunnel?

A. 450 feet, I believe.

(Testimony of R. A. Kinzie.)

Q. That makes quite a little difference in the efficiency of the power, does it not, Mr. Kinzie?

A. It does; yes.

Q. Now, Mr. Kinzie, prior to August 1st, 1910, how long had you been superintendent of the Alaska-Juneau property and this little mill built in the basin up above the old Ebner mill? A. August what?

Q. Prior to August 1st, 1910?

A. About 6 years.

Q. Did you personally look after the superintendency of that property during that time?

A. I did; yes.

Q. About how many trips did you make up there a week?

A. Oh, during the season I suppose I would average two trips a week.

Q. That would be something—about how many times a year would you say that you went up there?

A. That was only during the working season.

Q. During what months?

A. That would be from some time in June to some time in October.

Q. And in going up to this property you passed right along the Basin road near the old Ebner dam, and passed by all of the [1409—1259] Ebner's old workings, didn't you?

A. Well, I always went up the main wagon-road.

Q. That is what I say—it is called the Basin road?

A. Yes.

Q. Which is on the left-hand side of the creek as you go up? A. Yes.

(Testimony of R. A. Kinzie.)

Q. There is only one road up there, isn't there?

A. There is only one road.

Q. And you passed right up to the Ebner dam on all those trips that you made up there?

A. The nearest you would pass to the Ebner dam would be 200 or 250 feet, as you pass through the hollow there.

Q. You know that dam can be seen from a great many points along this road, don't you?

A. It can only be seen from one point.

Q. Did you see a photograph that we offered in evidence, Mr. Kinzie?

A. No, I will change it—it can be seen from two points.

Q. Don't you know, Mr. Kinzie, that there is a place along there for a thousand feet or more that you can look down and see the Ebner dam?

A. That is one of the points I have reference to; the road now goes around the hill, it used to go over the hill; you can see it from that point; there is nowhere you can see it for a distance of a thousand feet, not more than 100 feet.

Q. You don't think it is more than 100 feet?

A. I don't think so.

Q. You wouldn't be sure of that—you haven't made any special observation of that, have you?

A. Yes; I was up there with that same question in view about three weeks ago. [1410—1260]

Q. You were?

A. Yes; I think it was about three weeks ago yesterday.

(Testimony of R. A. Kinzie.)

Q. This sketch map here of plaintiff's which you have referred to as exhibit No. 64, what did you say that was taken from?

A. From bulletin No. 287 of U. S. Geological Survey Reports on the Juneau Gold Belt.

Q. Do you know what year that report came out?

A. I think it was 1905.

Q. Those reports are made up by whom, Mr. Kinzie? A. United States Government.

Q. Well, you don't know that the Ebner Gold Mining Company had anything to do with making this map or plat, do you, Mr. Kinzie?

A. The Ebner Gold Mining Company had anything to do with making that plat?

Q. Yes. A. No.

Q. And any data that would be placed on it would be placed by the parties who made it up, and the Ebner Gold Mining Company would have nothing to do with that? A. I don't know, I am sure.

Q. You claim, Mr. Kinzie, that you got the water through your flume line down to a place approximately where you have constructed your mill near the beach here at Juneau on the 22d day of June, 1913?

A. Used there hydraulicking off the hillside on June 22d, 1913.

Q. I simply asked you the question if you got it down to a point approximately where your mill is built near Juneau on June 22d, 1913,—did you say 22d or 27th?

A. The 22d of June. [1411—1261]

(Testimony of R. A. Kinzie.)

Q. Of what year? A. 1913.

Q. You cut out some gate-ways in your flume and let the water run down over the hill from those places until it entered Gastineau Channel?

A. Yes; ground sluicing.

Q. In ground sluicing do you usually commence on top of the hill or down near the bottom of the hill, as a rule? A. Always start at the top.

Q. How long did you let the water run in that way, Mr. Kinzie, before you put a giant on?

A. A giant was put on there—I won't be positive, Judge, either the 29th or 30th the first giant was put on.

Q. The 29th or 30th of what?

A. June—I am not positive of that date.

Q. Don't you know that you didn't have any in there for a long time after that, and that the water ran down the hillside there into Gastineau Channel?

A. No; I don't know that; we had a 4-inch giant brought over from Treadwell and then a 6-inch and 8-inch giant.

Q. You don't know what date you put that giant to work?

A. No; I don't know at this time; I haven't got any data on that.

Q. You hadn't at that time constructed any of the mill buildings? A. The mill building itself?

Q. Yes.

A. No; we hadn't; we had cut out and started the grading on our crusher house, and the work was then

(Testimony of R. A. Kinzie.)

in progress at both places and had been prior to that time.

Q. Then, if it is claimed in your pleadings in this case that you didn't get your water down to the present mill site until July 13th that is a mistake in your pleadings, is it? [1412—1262]

A. Certainly it is a mistake.

Q. You say now you got in there in June?

A. Yes.

Q. And if you say in your pleadings that it was in July or August, that is a mistake there, isn't it?

A. Yes; it is a mistake.

Q. And you verified all the pleadings in this case, didn't you? A. I did.

Q. Now, Mr. Kinzie, going back to the question of the air-compressor—you built your air-compressor and air-compressor building at Snow Slide gulch right near to where there is annually a snow slide down the gulch, didn't you?

A. Which compressor do you mean now?

Q. At Snow Slide gulch—you didn't build but one at Snow Slide gulch, did you?

A. Yes; we built two.

Q. You mean you built another besides the one that is there now? A. Yes.

Q. When did you put that in?

A. We put that in prior to November 17th, 1910.

Q. Is this one that you have installed there now installed at the same place? A. No; it is not.

Q. What is the difference between the two?

A. The original one was covered up by a snow

(Testimony of R. A. Kinzie.)

slide, and our present compressor is farther down the creek and in a protected position behind the bank.

Q. And that standing in a snow slide place, where the snow annually slides down there in great quantities, you installed your first air-compressor down there where it was partially taken out or covered up by a snow slide, didn't you? [1413—1263]

A. We did.

Q. That wouldn't be a very safe place for men to work would it? A. It wasn't no.

Q. Have you ever had any snow slides up there since you built this second one? A. Every winter.

Q. You haven't had any snow slides that interfered with this one you have on the gronud now, have you? A. No.

Q. Now, then, Mr. Kinzie, you know it would not be practical to build and operate a mill upon the Lotta claim, don't you?

A. I know to the contrary, it would be practical.

Q. What would you figure on doing with the tailings?

A. The tailings would have to be flumed out; of course at the present time if you owned the basin below you wouldn't have to do that; if you owned the basin below you could allow them to flow into the creek.

Q. If they came down and entered into your flume, then the only way you think that a mill could be built on the Lotta claim and operated would be by building a flume and sluicing the tailings on beyond your intake? A. Oh, no; oh, no.

(Testimony of R. A. Kinzie.)

Q. What would you do with them?

A. Dump them into the creek.

Q. If we dumped them into the creek they would enter your flume, wouldn't they?

A. That would be up to us.

Q. It would be up to you pretty strong, wouldn't it?

A. Why, yes; I guess it would be.

Q. You know you cannot dump them into the creek—it would cover [1414—1264] up your dam wouldn't it?

A. No; they would go over the dam; if they were dammed in at the intake of our flume, of course it would give us a great deal of trouble.

Q. Now, in figuring out the number of horse-power that you thought the Ebner Company would need down at these new workings, how many horse-power did you say that they would need, and under what conditions would they need it?

A. In answering your question I believe I have made a mistake in figuring the horse-power; I figured at 80 per cent efficiency, but figuring the real horse-power at 80 per cent—

Q. (By Mr. HELLENTHAL.) Do you mean horse-power, Mr. Kinzie, or water-power?

A. Figuring the water at 80 per cent efficiency, it would require 483 miner's inches of water to develop the horse-power that Mr. Muir said it was necessary for them to have.

Q. You give miner's inches of water instead of horse-power?

A. I took Mr. Muir's statement of 464 horse-power for that.

(Testimony of R. A. Kinzie.)

Q. And 464 horse-power at that head would be equal to—

A. At 80 per cent efficiency, 483 miner's inches of water.

Q. You mean at 80 per cent efficiency you make a discount of 20 per cent? A. Yes.

Q. What do you do that for?

A. That is to account for whatever loss there is in efficiency in your water wheels and pipe-line.

Q. That depends on how long you carry it through your pipe-line, doesn't it?

A. That is the usual loss, 20 per cent; figuring at 80 per cent efficiency you could get you 464 horse-power that Mr. Muir stated would be required with 483 miner's inches of water. [1415—1265]

Q. You figure that vertically, don't you?

A. No; it would only take 464-6/10 vertically.

Q. Now, supposing one person is using a pipe that is twice as long as another, does the friction have something to do with the efficiency of the power that is absolutely applied to your machinery?

A. It has nothing to do with it with the exception as to the diameter of the pipe.

Q. Well, the diameter of the pipe of course—in a large pipe there would be less friction, wouldn't there? A. Yes.

Q. And a smaller one more? A. Yes.

Q. What size pipe did you figure on using?

A. The proper size.

Q. What is the proper size?

A. I haven't figured it out; I think we have at

(Testimony of R. A. Kinzie.)

least 18-inch pipe, and we can easily get that efficiency through that pipe.

Q. Do you know what length of pipe—how long they have to pipe it?

A. Very short pipe—not over 500 feet of pipe.

Q. Well, is there any loss of efficiency there?

A. Yes.

Q. But figuring it all up together you figured that it would not amount to more than 20 per cent?

A. Yes; that is all the loss there should be.

Q. If it would be installed in the most modern, approved way? A. No; the ordinary way.

Q. Since what date? A. For the last 20 years.

Q. That is the basis you have figured on?
[1416—1266] A. Yes.

Q. How much water do you calculate it would take to run the kind of fan Mr. Muir testified concerning if they had about five thousand feet of pipe-line?

A. He didn't testify to any fan; he simply said his fan took so many horse-power, and I took his word for that.

Q. Didn't he testify that this water was piped into the tunnel?

A. No; he testified that two fans took 34 horse-power—is what he testified to.

Q. And you took his figures for that? A. I did.

Q. You didn't make any discount in the efficiency that there would be at the point of application by reason of any length of pipe, but simply took his word for it?

A. He didn't say anything about any length of

(Testimony of R. A. Kinzie.)

pipe; he simply said he had two fans installed that took so many horse-power.

Q. This matter of tailings—there is always more or less trouble in handling those, is there not, Mr. Kinzie? A. Tailings in the water?

Q. You have experienced some trouble down here at your mill, haven't you, in handling your tailings?

A. Yes; we have to wash our tailings.

Q. Filling in pretty rapidly down there isn't it?

A. Not at the present time; no; we are keeping it pretty well away since we have extended our flume out.

Q. It all goes into the Gastineau Channel, doesn't it?

A. Yes; but we are depositing it at the present time—most of it—under our wharf.

Q. But with a mill down there with the capacity that you say you are going to build there will be quite a job handling your tailings, won't there?

A. I think not. [1417—1267]

Q. You have had trouble over at Treadwell—made a whole lot of earth, haven't you?

A. We have been operating there for over 30 years, Judge.

Q. Well, your capacity here is going to be double or treble your capacity there, isn't that your testimony? A. Yes.

Q. And you would have double or treble the amount of tailings, wouldn't you? A. We would.

Q. Where did you see any excavation,—I don't remember, Mr. Kinzie, whether you testified con-

(Testimony of R. A. Kinzie.)

cerning it or not, but I believe you did, about some excavation up there around this building that we have referred to as the old compressor building on the Ebner property, and you have referred to it as the new mill—where did you ascertain that there was other grading done there?

A. I have been there while they were grading it—I have been on the ground while the men were at work; it is on the lower side of the mill building looking down stream.

Q. You don't know what that was graded off for, do you?

A. I know what they told me it was graded off for.

Q. What Ebner told you?

A. Yes; I think I had a conversation with Ebner the following year in regard to that; but I know at the time I was up there making the examination of the mine I went over that thing with Mr. Thane, who was then superintendent of the mine.

Q. But I am talking about any conversation you had with officials, president, and so forth—where was Ebner when you had this conversation with him?

A. I don't remember exactly, but my impression at this time is there was a little place right next to his house—the Ebner [1418—1268] Company used to have a little place there.

Q. Down town?

A. Yes; I am not positive as to that at this time.

Q. You are not positive of having any conversation with Ebner about it?

(Testimony of R. A. Kinzie.)

A. Yes; my recollection is quite clear on the conversation part, but as to the place and time I don't remember definitely now.

Q. Don't remember what year it was?

A. No; I don't.

Q. What is there in that building up there, Mr. Kinzie? A. At the present time?

Q. Yes. A. Nothing.

Q. If you had any conversation with Mr. Ebner it was prior to 1910, wasn't it?

A. Yes; it was prior to 1910.

Q. A long time prior wasn't it?

A. About four or five years.

Q. Mr. Ebner wasn't up here or had nothing to do with the running of that property up there prior to 1910, did he?

A. Oh, Mr. Ebner was here off and on almost continually, I think, up to 1910.

Q. When did you testify he quit working up there in running the old Ebner mill?

A. When Mr. Ebner quit?

Q. Yes.

A. I understood he owned the property until he transferred it, and I so testified.

Q. But when did you say he quit operating the old mill? A. About 1904 or '5; I am not sure.
[1419—1269]

Q. Prior to that time you had this conversation with him, did you?

A. No; it was during that time; it might have been just about 1904.

(Testimony of R. A. Kinzie.)

Q. You looked around and had a great many places in view, didn't you Mr. Kinzie, to build a mill before you built a mill down here on this site?

A. The exact spot?

Q. Yes. A. Yes; we did.

Q. You heard Mr. Bradley's testimony that they had some idea sometime of building a mill up in the Basin somewhere near your Gold Creek tunnel, didn't you?

A. Yes; we did,—not near the mouth of the Gold Creek tunnel.

Q. But up in that vicinity somewhere?

A. No; it was lower down the stream.

Q. How much lower down?

A. It was at this end of the Jualpa Basin; I don't know that he testified to it, though.

Q. You did have some idea of that, didn't you—it was a plan you talked over? A. Yes, sir.

Q. Then you commenced a tunnel out through town towards Sheep Creek at one time, didn't you?

A. Yes, sir.

Judge WINN.—That is all. [1420—1270]

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Kinzie, the slides concerning which you have been testifying up at the Mackay grade, what is the character of that slide, whether it is a rock slide or a snow slide? A. Rock slide.

Q. What character of slides does the danger consist in, from rock slides or snow slides?

A. At Shady Bend it would be rock slides.

(Testimony of R. A. Kinzie.)

Q. Now, Judge Winn has asked you some questions about high tension power lines along the beach—what is the character of the slides there?

A. Snow slides.

Q. What is the difference between a rock slide and a snow slide, with reference to the slide having a well defined course?

A. The snow slides have a well defined channel that they follow gullies; a rock slide will come from any point, and usually from the places where there hasn't been a slide in a great many years; and the danger that exists at Shady Bend is from the loose material and rock that is in the cliff immediately above the area called the Mackay grade.

Q. The danger there, you say, is from snow slides or from rock slides? A. Rock slides.

Mr. HELLENTHAL.—That is all.

Judge WINN.—That is all.

(Questions by the COURT.)

Q. Mr. Kinzie, I want to ask you a question or two—I don't know whether the point was covered here or at the preliminary hearing. When Gold Creek is at the normal flow there is enough water in it to fill your flume as it now exists, and to fill [1421—1271] the Ebner flume as it exists—that is, with that extra board that they have, isn't there?

A. There is—that is, during the summer months.

Q. Now, how many months in the year is there enough water in Gold Creek for you both, taking the full capacities of your flumes as now constructed—what months in the year is there sufficient water for

(Testimony of R. A. Kinzie.)

both? A. Five months.

Q. What five months are they?

A. With starting say the latter part of April, May, June, July, August and September and part of October; some years there would be a little more than five months.

Q. Now, there is a certain period of the year when there isn't water in Gold Creek for anybody, isn't there? A. Yes.

Q. What months in the year are they?

A. That varies from year to year, but you can usually count on February having a minimum flow in Gold Creek.

Q. In the month of February it is frozen over and very little water in it?

A. Practically no water at all.

Q. So the only months that this question is material, as to who has the first right to the water of Gold Creek would be March and the first part of April and the last part of October up to February?

A. Yes; of course during the month of February there really would be enough in the normal years to use for jacket water.

The COURT.—That is all.

(WITNESS EXCUSED.) [1422—1272]

The plaintiff, to further maintain the issues on its part, recalled as a witness in rebuttal RUSSELL CASEY, who having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

**Testimony of Russell Casey, for Plaintiff (Recalled
in Rebuttal).**

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You have been sworn, Mr. Casey?

A. Yes, sir.

Q. You know where the Ebner dam is.

A. Yes, sir.

Q. Were you up there in October, 1910?

A. Yes, sir.

Q. Was Harri there when you came?

A. His tent was there, I don't know if he was there.

Q. When you first went up there had there been any flume built between Harri's tent and the dam?

A. No, sir.

Q. Had there been any grading done?

A. Not that I saw.

Q. Had the Ebner dam been cut?

A. No, sir; it was cut the 6th of October.

Q. Were you there on the 6th of October?

A. Yes, sir.

Q. What happened there on the 6th of October?

A. Why, they put in the headgate and took lumber from the road there, if I remember right to the Ebner dam and put in a box—I believe two or three boxes—and cut the dam and let the water through to the left-hand side going down the creek—they put a hole in the first box to let the water down the [1423—1273] creek.

Q. Did you see them cut the dam? A. Yes, sir.

Q. You were present when that occurred?

(Testimony of Russell Casey.)

A. Yes, sir.

Q. Did you see Mr. Lindsay?

A. I walked up with him.

Mr. HELLENTHAL.—That's all.

Cross-examination.

(By Judge WINN.)

Q. What were you doing up there on October 6th?

A. Packing lumber.

Q. Who were you packing lumber for?

A. Packing for Mackay or the California-Nevada Company.

Q. Where were you packing lumber from?

A. From the flat over to the dam.

Q. What flat do you mean?

A. The Ebner flat; the teams dumped the lumber on the flat and we packed it up to the dam.

Q. On the 6th of October?

A. I guess it was the 6th of October.

Q. Don't you know that the lumber that was taken from the old mill was put up there to build that box?

A. I don't know any such thing.

Q. You don't know anything about that, do you?

A. I know the lumber I packed was from the flat.

Q. You say you packed lumber on the 6th day of October?

A. Yes; I was sent up there by Mackay to pack lumber.

Q. And you packed new lumber? A. Yes, sir.
[1424—1274]

Q. You packed new lumber on the 6th day of October? A. Yes, sir.

(Testimony of Russell Casey.)

Q. Don't you know that the first box that was put in up there was made from old lumber that came out of the old mill?

A. I don't know any such thing; no, it was not old lumber.

Q. And you were sent up there to pack lumber on the 6th of October? A. Yes.

Q. And you went up there with Lindsay?

A. Yes.

Q. Lindsay was working for the Alaska-Juneau Company, wasn't he? A. I suppose he was.

Q. How came you to go up there with him?

A. I met him on the road.

Q. Don't you know that you never did any work for Mackay in any way in the world except a little place where they were grading off the mill site?

A. No, sir.

Q. Didn't you work there all the time you were up there for Mackay? A. No, sir.

Q. Who hired you? A. Mackay.

Q. What did he say to you?

A. He told me to go up and help put in the flume; I don't know that Mackay—

Q. You said awhile ago that you were hired by Mackay? A. I was hired by Mackay.

Q. Give me the name of the man that sent you up there?

A. I was sent there by a man by the name of Patton.

Q. Who is Patton? A. I don't know who he is.

[1425—1275]

(Testimony of Russell Casey.)

Q. Ever seen him since?

A. Yes; he is some relation to—

Q. You won't say whether it was Mackay or Patton that gave you this order?

A. I wouldn't say; Fred Radel went up there either just before or shortly after.

Q. Who was up there that was cutting any place in the dam on the 6th day of October?

A. I don't remember.

Q. You don't remember? A. No, sir.

Q. Do you know any of these witnesses that testified on the witness-stand? A. I know them all.

Q. Riordan? A. Yes, sir.

Q. Carlson? A. Yes, sir.

Q. Al Black? A. Yes, sir.

Q. Was it any of those men?

A. I don't remember; I don't think Al Black was there.

Q. You don't remember who it was on the 6th that was doing this work?

A. There were 20 or 30 men; they wanted to get the box in.

Q. You don't remember who the men were that did the work on the 6th of October?

A. No, I don't remember; I remember seeing—

Q. Did you hear Riordan's testimony, and did you hear Carlson's testimony and did you hear Al Black's testimony—you have been here in the courthouse all the time, haven't you? [1426—1276]

A. Yes; some of the time; I don't care what they said.

(Testimony of Russell Casey.)

Q. Don't you know when they went over there to put in any part of the box or flume, that Al Black had been there prior to the time the box was put in, and had cut out a portion of the dam so that the water could run into the excavation?

A. I don't know it, no.

Q. What I understand you to say is this, that when you went up there on the 6th of October, somebody was working there putting in a headgate at the dam?

A. I said I was up there when they cut the dam—I guess it was the 6th; the dam had never been cut, or any headgate put in there; I was helping to pack lumber, and they put in the headgate while I was there.

Q. Don't you know that Mackay caused a headgate to be put in, and that it was some time about the 3d or 4th of October that this Mackay headgate was put in there?

A. I don't know anything of the kind.

Q. How do you fix this day as the 6th day of October?

A. That is the day they put the box in.

Q. How do you fix that day? A. My notes.

Q. When did you make any notes?

A. I didn't make any notes.

Q. What notes are you talking about then?

A. Mr. Lindsay's notes.

Q. You have refreshed your memory from looking at his notes and talking them over with Mr. Lindsay?

A. Not talking to Lindsay; looking at his field-notes.

(Testimony of Russell Casey.)

Q. Did you see Lindsay when he made those notes?

A. No.

Q. Then Lindsay didn't make those notes while you were with him? [1427—1277]

A. He made the notes that night, he told me.

Q. You said just now you didn't talk about it with him?

A. Not on the 6th—I have talked to him since we have been in the courthouse.

Q. And Lindsay told you he had a book with this in it, and that it was on the 6th, and you looked at the notes?

A. Lindsay read the notes here.

Q. Read them to you?

A. No, he didn't; he read them to you.

Q. That is the reason you swear it was on October 6th, because you saw it in Lindsay's notes?

A. Yes; but I know something else that happened two days afterwards, and that is why I stated it as the 6th—these two things I have to go by.

Q. Didn't you say a while ago that you knew it was on the 6th from what you saw in Lindsay's notes?

A. Yes; but something else happened two days after on the 8th.

Q. Didn't you say a while ago that it was on account of what you read from Lindsay's notes that you knew it was the 6th?

A. I might have said that.

Q. Now you want to change that, do you?

A. No; I don't want to change it.

Q. You based it on Lindsay's notes?

(Testimony of Russell Casey.)

A. I based it on his notes and something that happened two days later.

Q. Why didn't you put in this something a while ago when you stated how you remember it—you never thought of that second matter until just now, did you?

A. Yes; it stuck in my craw for a long time.

Q. You were working for Mackay, still you knew there was some contest between them and the Alaska-Juneau on the 6th when you accompanied Lindsay up there? [1428—1278]

A. I didn't accompany him up there; I was going up the road where you fellows put the fence up and I met him.

Q. And you had forgotten all about that date until you saw his notes and were talking to Lindsay?

A. I didn't say that.

Q. But you swear that the flume that was put in there was made out of new lumber?

A. I didn't say it was new lumber; I said if I remember right it was new lumber.

Q. Why don't you remember the lumber as well as you remember the date? A. I don't know.

Q. Now, it didn't take 25 or 30 men to cut this hole in the dam, did it? A. No, sir.

Q. Who are the men that did that?

A. I don't know.

Q. You were right there you said. A. Yes, sir.

Q. What was the first thing they did in cutting the hole?

A. Well, Mackay had pointed out the place on the

(Testimony of Russell Casey.)

dam and they had cut it out with axes or saws or something like that.

Q. How was it—an axe?

A. Two or three axes; if I remember there was a man by the name of August or something working on the dam.

Q. You don't remember of seeing any of these people I mentioned a while ago, Al Black,—

A. I don't; I knew him for years but I never knew him by name until I saw him in the courthouse.

Q. Will you swear that neither one of those was there at that time? [1429—1279]

A. I will swear that Al Black was not there.

Q. Will you swear that neither one of the others was there?

A. I won't swear, but I think Riordan was sharpening steel.

Q. Where? A. For the Ebner Company.

Q. At what place?

A. I don't know where the shop was; I think it was right alongside of the road.

Q. How long did you work up there packing lumber over to put a box in?

A. I worked from about, I believe, probably 10—half-past nine or ten o'clock until some time after half-past three or four that afternoon.

Q. What did you do then?

A. I went home and had my dinner.

Q. How long altogether did you work for Mackay?

A. I believe 29 days up here.

(Testimony of Russell Casey.)

Q. When did you commence and when did you quit?

A. I don't know; I am positive I quit on the 8th of October.

Q. But you don't remember when you commenced?

A. No, sir; I was driving a team for the Perseverance when I got that job there; I was the first one to work on the mill site, and Owen Kirk came afterward.

Q. The mill on Shady Bend? A. Yes, sir.

Judge WINN.—That's all.

Mr. HELLENTHAL.—That's all.

(WITNESS EXCUSED.) [1430—1280]

The plaintiff, to further maintain the issues on its part, recalled as a witness R. A. KINZIE, who having been previously sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of R. A. Kinzie, for Plaintiff (Recalled).

The COURT.—I would like to ask Mr. Kinzie a question.

Q. You made some calculations as to how much miner's inches the Ebner people would require, basing your estimate on Mr. Muir's testimony as to how much horse-power he wanted?

A. I did; yes, sir.

Q. I believe you said it was 483 miner's inches?

A. 483 miner's inches.

Q. How many miner's inches would be required for your purposes—how many miner's inches do you require for the purpose of operating your mill?

(Testimony of R. A. Kinzie.)

A. Well, we are using at the present time everything our flume will carry, and will need additional water.

Q. How many miner's inches does your flume carry?

A. The flume will carry approximately 3,000 miner's inches.

Q. How much did you locate, 10,000 miner's inches?

A. I think it was 20,000.

Q. Well, now, how many months in the year can the defendant get 483 miner's inches at its dam, and you get 20,000 miner's inches at your dam?

A. It is pretty hard to say; during the period of high-water very likely the creek is carrying over 20,000 miner's inches of water, but 20,000 miner's inches of water, I think, is as much as the normal flow of the stream; during the [1431—1281] last rainy spell there would have been plenty of water, but the surplus this year, so far there has been at least three months that we could have done it.

(Questions by Judge WINN.)

Q. You heard Mr. Muir's testimony of his computation of your flume, didn't you—how much he calculated your flume up here near one of your tunnels carries—2,000 inches of water, didn't he?

A. I don't remember any such testimony.

Q. He did testify to it, didn't he?

A. 2,000 miner's inches of water?

Q. Yes.

A. That would be all right; it will carry an excess

(Testimony of R. A. Kinzie.)

of about 3,000 miner's inches of water.

Q. He said 2,000.

A. 2,000—that would be about 3,000 cubic feet; it will carry a little more water than that.

Q. A little more than the estimate he made—don't you remember his testimony?

A. No; I don't remember his testimony; I don't know how carefully the measurements were taken there.

(WITNESS EXCUSED.)

(Whereupon court adjourned until 10 o'clock tomorrow morning.) [1432—1282]

MORNING SESSION.

August 11, 1914, 10 A. M.

R. A. KINZIE on the witness-stand.

Cross-examination.

(By Judge WINN.)

Q. In figuring out the number of miner's inches of water horse-power that you estimated that the Ebner Company would be in need of, that was simply taking into consideration what there would be an immediate need of according to Mr. Muir's testimony, wasn't it—that is, the immediate needs which he testified concerning, which they would need to apply the water to—you only took into consideration those immediate needs?

(Question not answered because of objection.)

Q. Now, then, Mr. Kinzie, in estimating the loss of efficiency in the application of water to the various uses which Mr. Muir testified that he was applying his water, and for which he testified there would

(Testimony of R. A. Kinzie.)

be an immediate demand for the application of it, I wish you would state to the Court definitely how you arrived at that discount of 20 per cent?

A. Well, the efficiency under that head of the ordinary water wheels—say water wheels of the Pelton type—would be between 85 and 87 per cent efficiency; not, if you take the difference between 85 and 87, the 80 per cent efficiency would be the loss due to friction, pipe-lines, valves, angles, and so forth, and such losses.

Q. You leave a very small margin there, don't you,—the wheel of the kind that is being used up there, it is always estimated there will be at least 25 per cent of efficiency lost in simply the application to the water wheel alone? [1433—1283]

A. Oh, no, Judge.

Q. What will that be.

A. The loss in the wheel itself?

Q. Yes, sir.

A. Oh, it will amount, in small wheels, to about 15 per cent.

Q. Then you are only allowing 5 per cent for friction and all the other losses, are you not?

A. Yes; that is very liberal.

Q. I wish you would tell the Court after the water is applied to the wheel, what is the next power that the wheel puts in motion—what is it for, that is, is it running fans?

A. In case of a fan, it is the contact with the fan, and as the wheel revolves there is the same number of revolutions of the fan.

(Testimony of R. A. Kinzie.)

Q. Suppose the fan is some 3,000 feet in the mine, what then?

A. As to the efficiency of the water wheel?

Q. Yes. A. No difference at all.

Q. Suppose the water is taken into the mine through pipe and applied to the wheel in the mines, would that make any difference?

A. It would not make any difference if larger piping were used, because if the larger piping were used you could reduce your friction.

Q. Do you want the Court to understand that the pipe which is used in driving the fan, which is 3,000 feet in the mine, that there would not be any loss by friction?

A. In the first place I didn't hear him say that the fan was 3,000 feet in the mine.

Q. Isn't that Mr. Muir's testimony?

A. No. [1434—1284]

Q. You are positive of that, are you?

A. I am quite positive he wouldn't put a fan 3,000 feet underground and run the water to it.

Q. Didn't he testify that the fans were run by separate water power?

A. Run by separate wheels; yes, sir.

Q. What do you understand that this wheel at the mill where the water is applied develops water for?

A. At which mill?

Q. Muir's place up there. A. Sampling mill?

Q. Yes. A. For driving the stamps.

Q. Isn't there any loss of efficiency after the power leaves the water wheel in the application of it to the

(Testimony of R. A. Kinzie.)

running of the stamps?

A. The loss isn't very large, not over one-half of one per cent.

Q. That is the only estimate that you have made in the 20 per cent loss, that there would be one-half of one per cent loss after it left the water wheel?

A. Simply the sliding of the belt.

Q. Any friction in the machinery of any kind?

A. That is part of the power it takes to run the mill.

Q. That is what?

A. That is included in the power; he put his power very high; he put it 25 where it ought to be about 12.

Q. I am asking you if there is any loss in friction in the application of power to the machinery that runs the stamps at the main water wheel?

A. That is what the power is doing, it is overcoming [1435—1285] the friction.

Q. How much of the efficiency would be lost in overcoming that?

A. That would depend on the installation, as to the friction in the main water wheel.

Q. You figure that to be only one-half of one per cent?

A. No, it would be more than one-half of one per cent.

Q. What would you figure it at?

A. I have never seen his stamps, but in 750 stamps it would not amount to more than $\frac{3}{4}$ per cent.

Q. And your estimate is not based on what kind of

(Testimony of R. A. Kinzie.)

machinery or stamp-mill he has up there?

A. I have never seen it.

Judge WINN.—That's all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. The friction in the main shaft and the other machines in the mill, that is part of the friction that the 20 per cent is to overcome?

A. Yes; that is what the power is for.

Q. That is no loss in efficiency as far as the development of the power is concerned?

A. It is entirely separate.

Q. Now, Mr. Kinzie, I would like to ask you about that fence, in regard to that fence that Mr. Harri put up there on the boundary of the Russell claim—what happened to that fence?

A. It was torn down.

Q. By whom?

A. That was the California-Nevada Copper Company.

Q. Did that impede their building of the flume any? A. I don't think so. [1436—1286]

Q. What did they do when they came to the fence?

A. They tore it down and went right through there.

Q. (Question by Judge WINN.) You know that flume line is built around that fence and shows it in one of the pictures, don't you? A. Yes.

Q. You know the fence was put up there on what we claim was the Fractional placer, don't you?

A. Yes.

Judge WINN.—That's all.

(WITNESS EXCUSED.) [1437—1287]

The plaintiff, to further maintain the issues on its part, recalled as a witness in rebuttal JAMES LYNN, who, having been previously sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of James Lynn, for Plaintiff (Recalled in Rebuttal).

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You have been sworn, Mr. Lynn?

A. Yes, sir.

Q. Do you know where the Ebner dam is?

A. Yes, sir.

Q. Did you have any occasion to go up there in October, 1910? A. Yes, sir.

Q. At the time you went up there was Harri already on the ground with his tent? A. Yes, sir.

Q. Do you know the exact date that you went up there first? A. No, sir, I don't.

Q. But you do know that Harri was on the ground?

A. Harri was there; yes.

Q. What did you go up there for?

A. I was hauling lumber.

Q. For whom?

A. California-Nevada Copper Company.

Q. To where? A. To the dam.

Q. Was there any lumber there when you delivered your first load of lumber? A. No, sir.

Q. That was the first lumber delivered?

A. Yes. [1438—1288].

Q. At that time had there been any grade built be-

(Testimony of James Lynn.)

tween Harri's tent and the dam?

A. No; there was no grade there.

Q. Had the dam been cut?

A. Well, I am not sure about the dam; always has been an old dam there, and I don't know anything about the dam.

Q. You are not sure about the condition of the dam? A. No, sir.

Q. But you know there was no grade between Harri's tent and the dam itself?

A. No; there was no grade there.

Q. Now, had there been any flume put in?

A. No, sir.

Q. None whatever when you delivered the first load of lumber? A. Not a bit.

Q. It was afterwards that the flume was built—after you delivered the first load of lumber?

A. Yes.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. Where did you deliver that lumber you took up there? A. I delivered it at the dam.

Q. How near to the dam?

A. Right at the dam—as close as you could get to it with a team.

Q. How close was that? A. Maybe 40 feet.

Q. Did you turn off that little road that leads from the main Basin Road to the dam? A. Yes, sir.

Q. You saw a road there, cleared out? [1439—1289] A. Yes.

(Testimony of James Lynn.)

Q. And the first lumber you took up there you unloaded, you think, about 40 feet from the dam?

A. Well—

Q. Was it above the dam or below the dam?

A. Above the dam.

Q. What date was it?

A. I don't remember the date.

Q. You don't remember the date? A. No, sir.

Q. Did you go down below the dam to see whether there had been a box about 14 or 15 feet long put in, just below the dam? A. No, sir.

Q. And you couldn't tell whether there had been—you were not looking for that, were you?

A. No, sir; I wasn't looking for that.

Q. You don't know whether there was a place cut out in the dam or not—you didn't take any notice of that? A. No, sir.

Q. Did you see that fence that Harri had put up between the tent and the dam when you were up there?

A. I don't know nothing about a fence; no.

Q. Now, you don't want the Court to understand that between the dam and Harri's tent that the right of way had not been all cleared off and prepared when you were up there, do you?

A. Why, there was a place for me to drive in and turn around with a four-horse team.

Q. And you know between the dam and Harri's tent that the grade had been prepared there, hadn't it, for a flume, when you were up there?

(Testimony of James Lynn.)

A. I don't think there was any grade there at all.
[1440—1290]

Q. Do you say it had been cleared out and graded and prepared for a flume, or were you looking for that?

A. I wasn't paying much attention to that part of it.

Q. Who were you hauling the lumber up there for?

A. The California-Nevada Copper Company.

Judge WINN.—That is all.

(WITNESS EXCUSED.) [1441—1291]

The plaintiff, to further maintain the issues on its part, recalled, for cross-examination, J. B. MARSHALL, who, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Testimony of J. B. Marshall, for Plaintiff (Recalled).

Cross-examination.

(By Judge WINN.)

Q. Now, Mr. Marshall, in determining by you the boundaries of the Harris Mining District so as to ascertain some of the facts that you have testified to in this case, and also in making up this list which was offered in evidence while you were on the witness-stand, where did you take the boundaries of the Harris Mining District to be?

A. From the Taku River on the south to Salmon Creek—well it was first established at Salmon Creek

(Testimony of J. B. Marshall.)

on the north, and afterwards, I think, at Auk Village.

Q. Which one of the boundaries did you take as the boundary; did you take the boundary as described by this society that they call the Miners' Organization, or did you take one wherein they amend the boundaries?

A. I took it where they amended the original boundaries?

Q. And that ran over to what point?

A. Taku River up to Auk Village.

Q. Around Stephen's Passage?

A. It included Douglas Island.

Q. Did it include any of Admiralty Island, the way you figured it? A. No, sir.

Q. This description, the one you took reads as follows: [1442—1292] "Commencing at the Auk Indian Village and running northeast to the boundary line of Alaska and British Columbia, thence along said boundary line to where it intersects the Taku River, thence down the Taku River and Taku Inlet to Stephen's Passage, thence along Stephen's Passage to the point of beginning"—is that the one you took? A. Yes, sir.

Q. Then the Auk Village you took for the starting point wasn't this Auk Village in Juneau?

A. No; it is behind Douglas Island here.

Q. There is nothing in the record, however, to show which Auk Village the miner's organization determined upon, is there? A. I hardly think there is.

Q. You don't know how long this Auk Village here

(Testimony of J. B. Marshall.)

in Juneau and the one up above Juneau have been in existence, do you? A. No, sir.

Q. I notice by this exhibit, which is Plaintiff's Exhibit No. 41, being a list which you prepared, or went over and checked over, but which you say in the first instance was not prepared by you—who did you say prepared this?

A. Mr. Hellenthal brought it to me; I presume it was prepared in his office, I don't know.

Q. Then you checked over just what books of record, Mr. Marshall, there are in the recorder's office in checking this list?

A. In what are known as 1 to 11 in placers; I will say there is a little confusion in regard to book 1; there are two books down there that are known as book 1; I think one is exclusively a placer book while the other is mixed with lode locations and probably other instruments, too.

Q. Now, I will ask you, Mr. Marshall, while we are on this subject [1443—1293] of the confusion of those two books, if you haven't included in this list which you have here any of what may be called Volume 2 of Miners' Claims and Water Rights and Placer Locations, and you have them in as water location notices?

A. I think not; there are some of these that are combined, the placer locations and the water locations combined.

Q. Have you that book here in court?

A. No, I haven't; I didn't bring the book up.

(Testimony of J. B. Marshall.)

Q. Could you bring it up—I want to direct your attention to it?

A. I didn't have any reference to Volume 2.

Q. You have reference to Volume 1—you call it Volume 1? A. Volume 1, page 45.

Q. Now, Mr. Marshall, in determining and figuring up in this list which you prepared as to how many notices of water locations that conveyed the water to specific points of use, what did you take into consideration?

A. Well, whether it designated a point where the water was to be used in a general way.

Q. General way—what do you mean in a general way?

A. I mean if it described the place of use in such a way that the place of use could be indicated, I included it in there.

Q. Supposing the notice should read: "Place of intended use, for working the claim situated on the northwest or left-hand side going up the creek known as the ——— creek"—what would you take that to designate?

A. Taking into consideration all of the locators of the claims, if it was evidently the same parties who located the claims and the claims referred to could be identified, I would take that as designating the place of use. [1444—1294]

Q. Another one is this way—"Place of intended use, locators' bar claim located opposite to the Jackson and Parks Creek claims in the gulch"—what would you take that—as a specific designation?

(Testimony of J. B. Marshall.)

A. Yes, sir.

Q. Then, for instance, where you would have "300 inches or less to be conveyed on any place on our placer mining ground in said gulch or outside of said gulch"—you would take that as a designation?

A. If the placer mining ground could be located, yes, sir.

Q. You checked over, then, these mining location notices and the record which was given you by Mr. Hellenthal? Volumes what? A. 1 to 11.

Q. Of what?

A. Placer and Water Locations; I stated that some of the references to 1 are in this book there known as Lode and Placer Claims and Water Rights, and the entries in this are rather confused.

Q. Now, those are the only books that you went through to ascertain about water locations, are they?

A. Only the Placer and Water books; yes, sir.

Q. No others? A. No, sir.

Q. Those are the only volumes? A. Yes, sir.

Q. Now, in estimating the place at which the water was to be used, if it designated that this water was to be used upon certain properties, and so forth, you took that as being the designation of the place of use of the water? A. Yes, sir. [1445—1295]

Q. Now, then, do you know, Mr. Marshall, outside of that question of the designation of the place of use, as to how many of these water location notices that you checked over that absolutely give some definite and certain point of use?

A. Well, if you are going to say so that you can

(Testimony of J. B. Marshall.)

fix the exact point where it is used, then I cannot give you any intelligent estimate on that; I think there are relatively few that fix a definite point.

Q. Very few? A. Very few.

Q. I will ask you if it isn't a fact that out of this list that you have prepared, there are 134 location notices that designate no place of use at all?

A. You mean of the ones I have stated which designate the place of use?

Q. I mean in this entire list that you went over and checked over—which is this exhibit that has been offered in evidence?

A. The total number, I think, was 386.

Q. Well, I think we go you a little better—I think we have 456 total number of locations that we have discovered.

A. They are a great many that are not within the Harris Mining District; what we have been discussing are in the Harris Mining District.

Q. You haven't included in this list anything but what you determined was in the Harris Mining District from reading over the boundary lines as I read them to you?

A. I attempted to do that; I may have been wrong and gotten a few outside of that; there are some names around here that are used for unnamed creeks that are used quite frequently, [1446—1296] but I attempted to confine them to the Harris Mining District, and I think I did so very thoroughly.

Q. As well as you could? A. Yes, sir.

Q. I will ask you as to how many of these water

(Testimony of J. B. Marshall.)

location notices that you checked over had absolutely any place designated for the use of the water?

A. Seventy-five.

Q. You only got 75? A. Yes.

Q. Did you make a careful examination of that, Mr. Marshall? A. Yes, sir.

Q. A careful examination of the books that you have mentioned just now that you went over?

A. Yes.

Q. Seventy-five out of how many?

A. Out of 386.

Q. That had no place designated?

A. No place designated at all.

Q. How many had this general designation, such as on a certain mining claim that the water was to be conveyed to and used on—do you remember?

A. No; I cannot distinguish now as to the number that designated in a certain way and the number that designated in a certain other way.

Q. Now, how many—you don't remember how many of these location notices that absolutely had a point designated for the use—you haven't segregated them? A. No, sir.

Q. But in making your estimate you took the general description [1447—1297] of certain mining claims that were referred to in there, stating that the water was to be taken up for certain mining claims to be used upon them, and you included that as the designation? A. Yes, sir.

Q. But, of course, where it had a particular point of designation, you included that, too?

(Testimony of J. B. Marshall.)

A. Yes, sir.

Q. And you don't remember how many had a particular point of designation? A. No, sir.

Q. And you say you think that 75 out of the list that you have there had no place designated for use?

A. Yes, sir.

Q. Now, did you make any estimate, Mr. Marshall, of this list that you have to ascertain how many of those notices stated that they took up so many miner's inches of water, and how many of them said that they took up water in some other way?

A. No, I wasn't requested to ascertain anything of that sort.

Q. You were not requested to check it for that purpose? A. No.

Q. Now, how many water location notices, Mr. Marshall, out of this list that you prepared or checked over, did you find had the date of posting upon it, and of course, the notice will show when it is recorded, and had the date of the notice on—had these three things—do you understand?

A. Yes, but I didn't check it for the date of posting; I checked it for the date as the same appeared on the notice.

Q. You didn't make any checking for that?

A. No.

Q. That is, you cannot tell me out of this number of water [1448—1298] location notices which you have checked over, how many had the notice date, and the date of posting on the mining claim?

A. No; I didn't check it for that purpose.

(Testimony of J. B. Marshall.)

Q. Don't you know that there is a very small proportion of them, Mr. Marshall, in looking over the records that have any date of posting on them?

A. Yes.

Q. Now, then I will ask you another question, Mr. Marshall,—did you find any notices of water locations that had the date of posting subsequent to the date of notice?

A. I think I remember a very small number—I don't think it was more than two or three that I recall the date of posting and the date of notice together and a difference between the two.

Q. You made no particular examination, though, to ascertain this fact? A. No, sir.

Q. Now, did you find any notice that had the date of notice after the date of posting?

A. I cannot recall that; I wasn't looking for the date of posting and I didn't pay any attention to that.

Q. You didn't pay any attention particularly to the date of posting? A. No, sir.

Q. Now, then, in your summary where you say that a certain number of water location notices were recorded within 10 days, you arrived at that conclusion by seeing the date on the notice and then seeing that it was recorded within 10 days from the date of the notice, irrespective of ascertaining as to when the notice was posted upon the mining claim?

A. Yes, sir. [1449—1299]

Q. Now, then, of course, in arriving at that estimation of the number of water location notices that

(Testimony of J. B. Marshall.)

were recorded within 10 days, there is nothing on the record to show as to whether or not the notice was ever posted, in a great many of them, is there?

A. I think there is only a very few that show the notice was ever posted.

Q. A very few of them? A. Yes, sir.

Q. Then, of course, in arriving at this number that you say were recorded within 10 days, you give the benefit of that point to all of those that had a date on them and show from that date the recording was within 10 days? A. Yes.

Q. Of course there is nothing on the record to show whether a large portion of those notices were ever posted upon the claim, is there? A. Not many.

Q. You simply had to conclude that the party did post them upon the claim?

A. I didn't conclude anything about it; I didn't know anything about it; the record didn't show it.

Q. But in making your estimation, Mr. Marshall, of those that were recorded within the 10-day limit, you did take notice of the date of location and date of recording? A. Yes, sir.

Q. Irrespective of anything on the record that would show when the notice was posted?

A. Yes, sir.

Q. Now, in making up this data, then, that is at the head of this list, Mr. Marshall, which you prepared, you have "A, [1450—1300] place on intended use," and under that subdivision A you included all of the notices that had a specific spot designated for the use of the water, and all those in

(Testimony of J. B. Marshall.)

a general way that stated it was to be used upon certain mining claims?

A. If it showed where they were to be used they are all designated by that letter A.

Q. Supposing a notice would say it was to be used on my placer mining claim, the claim opposite that notice?

(Question not answered because of objection.)

Q. Well, then, Mr. Marshall, "X, no place of use designated"—that is where absolutely there is an absence of anything in the notice about where the water is to be used? A. Yes, sir.

Q. Then, under "B, where time between location and recording is 10 days or less"—that is a pretty broad assertion—what do you mean?

A. I mean that where in the notice—at the beginning, the body of it, or at the end,—it showed a date, I then looked to see if the date stamped by the recorder as being the date of filing for record was within 10 days of that date; if it was, I included it in that.

Q. Irrespective of whether the notice does show it had been posted? A. Yes, sir.

Q. Now, on this "O, where time between location and recording is more than 10 days"—how did you arrive at that?

A. I arrived at that in the same method I described in the other.

Q. Whether the notice designated whether it was posted or not? A. Yes, sir.

Q. Then, you say "Where time between location

(Testimony of J. B. Marshall.)

and recording is 10 days or less" you mean that the only location of the water [1451—1301] right that would appear upon the record would be just the fact that you have stated? A. Yes, sir.

Q. Without anything about the posting?

A. Yes, sir.

Judge WINN.—I think that is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Marshall, in determining the date of location, as I understand it you fixed upon the date given in the notice as the date of such location?

A. Yes, sir.

Q. There are no records in your office, affidavits or other records, that indicate as to whether a notice was posted?

A. No; there is—well, I say there is not—now, I don't remember exactly the form in which it appeared, but I think in the end of the notice the time of posting was set forth.

Q. The original notice merely dates the notice and subscribes it and records it? A. Yes, sir.

Q. I want to get this clear into the record, Mr. Marshall—that is how you determined the date of posting, irrespective of all other evidence, that is, from the date contained in the notice?

A. I didn't determine the date of posting at all.

Q. Calling your attention now to exhibit No. 54, on the 3d page of that exhibit you will notice this in the notice, "Notice posted on the creek this 17th day of November, 1905. Witness my hand and seal this

(Testimony of J. B. Marshall.)

17th day of November, 1905. The Alaska Perseverance Mining Company, by John R. [1452—1302] Mitchell, Agent"—that is one of the character of notices that I have just asked you about.

A. Yes, sir.

Q. That is one of the notices that contains a statement of when the notice was posted?

A. Yes, sir.

Q. And one of the few that contains such a statement? A. Very few.

Q. The ordinary notice does not contain any statement of posting? A. No, sir.

Q. But the ordinary statement is subscribed to—that is, the blank day of blank?

A. Indicates the day on the notice.

Q. Here now, for instance, calling your attention to exhibit No. 55, the first page of that exhibit, reads like this: "This 5th day of February, 1900. Oscar Ohman."—that is one character of notice.

A. Yes.

Q. In that notice you would take the date as being located on the 5th of February, 1900? A. Yes, sir.

Q. That you call the date given in the notice?

A. Yes, sir.

Q. Nothing in there to show when it was posted?

A. No, sir.

Q. Nothing but date of location?

A. That is all.

Q. Now, the following one on the same page: "Filed for record this 12th day of May, 1901"—that also does not refer to the date of posting? [1453—1303]

(Testimony of J. B. Marshall.)

A. No.

Q. Merely shows the date of location of the water right? A. Yes.

Q. And the date of location was fixed by you in this list in a similar manner? A. Yes, sir.

Q. Now, calling your attention to exhibit No. 58, the notice reads: "Dated August 1st, 1910"—that is the usual way for a water location notice to be dated?

A. That is quite a common way; sometimes the date appears up here at the top and sometimes it appears in the body of the notice, like this: "Notice is hereby given that we, the undersigned, on the 5th day" and so on; and sometimes in the body, and sometimes at the bottom.

Q. Then that date, wherever it appears or however it appears, you took as the date of location?

A. Yes, sir.

Q. In order to determine whether it had been recorded within 10 days after that date?

A. Yes, sir.

Q. Now, Mr. Marshall, just another question—in preparing this, in going over this notice did you go over all the books that contained water right notices in your office?

A. I have never found a water right notice in any other book, and I don't believe there are any in any other books except those that are designated as Placer and Water Right records.

Q. Those are the books you went over?

A. Yes, sir.

Q. And you took all the notices that are contained

(Testimony of J. B. Marshall.)

in those books as located within the Harris Mining District? [1454—1304] A. Yes, sir.

Mr. HELLENTHAL.—That is all.

(Questions by the COURT.)

Q. In making up that list, or in checking up that list, of course you came to the location notice signed by H. T. Tripp, locating 10,000 miner's inches of water flowing in Gold Creek? A. Yes, sir.

Q. Said notice reading as follows: "To convey by ditch, flume and pipe along the bank of Gold Creek on the southerly side or to cross the creek with pipe or flume or both to any place on the property known as the Ebner mine, or to carry across or farther than the limits of the said mine property."—Now, in which category did you place that notice so far as stating the place of intended use?

A. Why, I think I would take that as indicating the place of use.

Q. Did you? A. I cannot remember.

Q. Take your list and see whether you did or not; it was recorded on the 25th day of October, 1910.

A. Yes, sir.

Q. You put that in the list as showing the place of use? A. Yes, sir.

Q. Are you able to state with any degree of accuracy how many notices of that general character you found? A. No; I could not.

Q. You could not state that?

A. No, sir; I would like to say that, for instance, where that says, or at any other place, or some such language as that, the mere fact that it might have

(Testimony of J. B. Marshall.)

been used at some other [1455—1305] place, I didn't allow that to interfere with the idea that the use was designated if it said any certain place, it said on the Ebner mine.

Q. Well, now, if you find a notice like this: "To be conveyed by ditch, flume or pipe, or in any other practical or convenient way from said creek and creek bed"—what category would you put that notice in?

A. I think I would place that in the list as not indicating a place of use; it says simply to be taken from the creek bed, and it doesn't say where to.

Q. Now, see whether on the 17th day of August, 1910, see where you put the location notice signed by the Ebner Gold Mining Company by John R. Winn, its agent.

A. I put that "X-B, the place of use not designated, recorded within 10 days."

Q. Well, now: "To be conveyed by ditch, flume or pipe or any other practical or convenient way from said creek and creek bed and to be used in the working and mining and development of the mines owned by said Ebner Gold Mining Company, and in milling, treating and reducing the ores taken from said mines of said corporation and for other beneficial and useful purposes"?

A. I remember that the question came up about this very notice, and the result was this that where the notice said it was water used to develop the mine, I put it as the place not designated; where it said to be used on a mine I put it in as the place of use

(Testimony of J. B. Marshall.)

designated; I don't remember that particular notice and I don't know how I put that particular notice in.

Q. Now, in your list did you place a notice recorded on the 8th day of August, 1910, signed by L. D. Mulligan? [1456—1306]

A. I placed it as a place of use not designated—X-B.

The COURT.—That is all.

(WITNESS EXCUSED.) [1457—1307]

Mr. HELLENTHAL.—I will offer in evidence the complaint in the case of H. T. Tripp vs. Alaska-Juneau Gold Mining Company, a corporation, Alaska Treadwell Gold Mining Company, a corporation, O. M. Harri and R. G. Datson.

(Whereupon said complaint was received in evidence and marked Plaintiff's Exhibit No. 65.)

Mr. HELLENTHAL.—It is now agreed between counsel that the allegations contained in plaintiff's reply, commencing on the fifth line of page 11, with the words, "In this connection the plaintiff avers that on the 8th day of May, 1911, the defendant, the Ebner Gold Mining Company brought an action against the plaintiff, the Alaska-Juneau Gold Mining Company in the District Court for the District of Alaska, Division Number One, at Juneau, said action being No. 835-A on the docket of said Court," and so forth—that the reply commencing with the language on page 11, up to and including the words, "Done in open court this 17th day of March, A. D. 1914. Robert W. Jennings, Judge," on page 80, states correctly the proceedings had by and between

the Ebner Gold Mining Company on the one hand and the Alaska-Juneau Gold Mining Company on the other, in the case entitled "The Ebner Gold Mining Company vs. the Alaska-Juneau Gold Mining Company," brought in the District Court for the District of Alaska, Division No. 1, at the time indicated in the papers referred to in these allegations and determined in the manner indicated in the allegations referred to, the same being cause No. 835-A.

Mr. HELLENTHAL.—Now, your Honor, I offer in evidence some of the findings of Judge Wickersham in the case of C. M. Thorndyke, et als, vs. the Alaska Perseverance Mining Company. The findings that I am offering are findings that refer to the miners' rules and regulations relating to the diversion and appropriation of water which have been received in evidence [1458—1308] in this case, the purpose being to show that these rules and regulations were appealed to in the courts and relied upon in the courts in making their decision governing the appropriation of water. I am only offering such findings as relate to this matter. The first finding I offer will be finding No. 3, beginning on page 1130 of volume 3 of the printed record of that case as it has gone to the Circuit Court of Appeals; also findings 17 and 18—finding 17 refers to an exhibit in the case so I will have to offer that exhibit also—that is, a portion of it—such portion as findings 17 relates to.

(Whereupon said findings were read into evidence as follows:)

3. "The Court further finds that in October, 1880,

the miners in and near the vicinity of the present site of Juneau, Alaska, discovered gold in Silver Bow Basin, where the property in litigation in this case is situated; they called miners' meetings, organized the Harris Mining District, embracing such basin, adopted rules and regulations governing the location, size and rights of miners' claims, elected a local recorder, and instituted a miners' form of government where none had previously existed. At a subsequent meeting held in February 18, 1882, the miners adopted additional rules and regulations governing the appropriation and diversion of water from streams for mining and other beneficial uses, and that the rules and regulations governing the appropriation and use of water, as set forth in said miners' rules and regulations, were as follows, to wit:

'Art. 1. The right to use the running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

Art. 2. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purposes, the right [1459—1309] ceases.

Art. 3. The person entitled to the use may change the place of diversion if others are not injured by such change may extend the ditch, flume, pipe or aqueduct by which the diversion is made to take place beyond that where the first use was made.

Art. 4. A water appropriation may be turned into the channel of another stream and mingle with its waters and then reclaimed, but in reclaiming it the

water already appropriated by another must not be diminished.

Art. 5. As between appropriators, the one first in time is the first in right.

Art. 6. A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: First, he claims the water there flowing to the extent of (giving number) inches, measured under six-inch pressure; second, the purpose for which he claims it and the place of intended use. A copy of the notice must within (10) ten days after it is posted be recorded in the books kept by the recorder of the district.

Art. 7. Within twenty days, during the working season, after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by rain or snow.

Art. 8. By completion is meant conducting the waters to the place of intended use.

Art. 9. By a compliance with the above rules, the claimant's rights to the use of water relates back to the time the notice was posted.

Art. 10. A failure to comply with such rules deprives the claimant of the right to the use of the water as against a [1460—1310] subsequent claimant who complies therewith.' "

Finding 17. "The Court further finds, after a

careful consideration of the evidence and the law relating to the miners' rules of the Harris Mining District, which were adopted in 1880, and contained in the first series of ten articles referred to in plaintiffs' complaint, and marked Plaintiff's Exhibit No. 16 in this case, fell into utter disuse before the rights of either of the parties to this action were claimed to be initiated, and that the same are inconsistent with the general laws of the United States and are, therefore, of no effect in the determination of the issues in this case."

Finding 18. "The Court further finds that prior to the year of 1884, the miners of the Harris Mining District adopted rules governing the appropriation of water on public lands for mining purposes, and ever since that act the miners throughout the various camps in Alaska, and particularly Harris Mining District, have conformed to the custom of posting notices and declaration of water rights and the recording of the same, and the waters from public streams have been diverted and used for mining and other beneficial uses, and such was the custom at the time of the initiation of defendant's rights herein and the commencement of this action and down to the present time."

Judge WINN.—We will agree that the first ten articles in this exhibit 33 in this case are the same as referred to in the findings of Judge Wickersham as being exhibit No. 16 of the plaintiff in the case of Thorndyke et al. vs. the Alaska Perseverance Mining Company.

(Whereupon court adjourned until 1:30 P. M.)
[1461—1311]

AFTERNOON SESSION.

August 11th, 1914, 1:30 P. M.

The plaintiff, to further maintain the issues on its part, introduced as a witness in rebuttal SIMON HELLENTHAL, who being sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

**Testimony of Simon Hellenthal, for Plaintiff
(In Rebuttal).**

Direct Examination.

(By Mr. HELLENTHAL.)

Q. I hand you here a paper that purports to be a list of authorities, and ask you to look at it—you are familiar with that document?

A. I am.

Q. Where did it come from?

A. It has been in our custody since the preliminary hearing on the injunction matter; it was handed us either by Winn or Burton of the firm of Winn and Burton.

Q. What is the purpose of it?

A. It is supposed to be a copy of a brief filed at that time.

Q. On what point—just indicate the circumstance.

A. There was a contention in this court at that time whether or not the court should take judicial notice of the customs as they existed in the Harris Mining District.

Q. Rules or customs? A. Rules and customs.

Q. At that time who requested the court to take

(Testimony of Simon Hellenthal.)

judicial notice of those rules and regulations?

(Objection to question and question withdrawn.)

Q. What contention was made by the defendant in this case upon the hearing for a preliminary injunction heard some few months [1462—1312] ago with relation to the miners' rules that are in evidence here?

A. It was contended by the attorneys representing all the defendants that the court should take judicial notice of the rules and regulations as set up in the case of Thorndyke and others against the Alaska Perseverance Mining Company.

Q. What rules and regulations are you referring to with reference to those that are in evidence now?

A. The same rules as are now in evidence pertaining to the appropriation and acquisition and the rights of water.

Q. Was there any contention made at that preliminary hearing or was there any evidence before the court that those rules were in force?

A. It was contended that there were certain facts presented in the case of the Ebner Gold Mining Company against the Alaska-Juneau Gold Mining Company, Case 835 of this court, in which the complaint set up certain rules—

Q. When you say certain rules, what rules do you mean?

A. Certain rules set up in that complaint regarding the right to use the water, being the same rules that we have offered in evidence in this case, being the last 11 rules which were adopted by the miners

(Testimony of Simon Hellenthal.)

in February, 1882, it was contended that as long as these rules were set up in this complaint they were before the court, that this was previously between the same parties, and the complaint was offered in evidence.

Q. This complaint was offered in evidence by the defendant? A. Yes, sir.

Q. Was there any contention at that time made by the defendants that these rules were in force at the time this hearing was had, and were observed?
[1463—1313]

A. That was the contention.

Q. That they were in force? A. Yes, sir.

Q. Now, previous to the hearing, or at the time of the hearing, were all the defendants in this case before the court?

A. I wouldn't be certain, but the records show, I think, that they were.

Q. They were all being represented by whom?

A. Winn & Burton.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Judge WINN.)

Q. If any such contention was made, Mr. Hellenthal, in that case by counsel in argument, the argument was based on, principally, the fact that Judge Wickersham had, in some way or another recognized these miners' rules and regulations with respect to the appropriation of water, wasn't it?

A. Yes; it was made in connection with the case

(Testimony of Simon Hellenthal.)

of Thorndyke against the Alaska Perseverance Mining Company.

Q. And now it has been ascertained from the original decision of Judge Wickersham, from the files in this case, that that was different from any public or printed decision that was to be had at the time that argument was made—isn't that so?

A. I don't think so.

Q. Did you know until this morning that Judge Wickersham's decision—the private opinion in this case, is different from his printed decision in the record in the Thorndyke case?

A. No; I don't think that is the original opinion that is on [1464—1314] file here; it is only a carbon copy; I think that copy has been modified by interlineations—I am still trying to find that out.

Q. You know that Judge Jennings, upon passing on this case, did not take into consideration anything about miners' rules and regulations, don't you?

A. He passed upon them and found that they were in force.

Q. Judge Jennings, in the rendition of his decision in this case?

A. If I remember rightly, yes.

Q. Your contention is, then, that this court has already passed upon the proposition that the miners' rules and regulations pertaining to the acquisition of water were in force and effect at the time the temporary hearing was had in this case—is that your contention? A. That is my understanding.

(Testimony of Simon Hellenthal.)

Q. And it was under testimony offered by myself as to the existence of the miners' rules and regulations?

A. You contended that the offer of that complaint was testimony.

Q. And so there was no testimony offered on behalf of myself, either by affidavit or otherwise, that the miners' rules and regulations were in force and effect?

A. Not unless you considered the sworn complaint testimony on it, and I think that is testimony.

Q. And so aside from that there was no testimony offered in the case at all?

A. No; not aside from that.

Q. Don't you know in 835-A, that there was no contention made on the trial of that case about the existence or non-existence of the miners' rules and regulations with respect [1465—1315] to taking up water, but the only proposition passed upon by Judge Cushman was a question of crossing through this land for the purpose of conveying the water?

A. No; I don't know any such thing; I consider that in that case there were two important questions—there was one preliminary question, and that was whether there was any riparian rights in the case.

Q. Aside from that, Mr. Hellenthal, I will ask you if it isn't true that the findings of fact of Judge Cushman in that case only found upon a certain custom about crossing through land, and he made no reference whatever to the miners' rules and regulations. You stated that in the complaint in 835-A

(Testimony of Simon Hellenthal.)

the miners' rules were set forth?

A. It is in our answer—I stand corrected—it was in the answer in place of the complaint.

Q. There were no findings made or anything taken into consideration by Judge Cushman on the rendition of his decision about the rules and regulations—he simply found on the custom, didn't he?

A. Found on two things—just found on the rules. Judge WINN.—That is all.

(WITNESS EXCUSED.) [1466—1316]

Mr. HELLENTHAL.—I now offer in evidence the opinion of this Court upon the preliminary injunction, as it appears in the files and records of this case, No. 1074-A.

(Whereupon said opinion was read into the record as follows:)

“In the United States District Court, for the District of Alaska, Division No. One.

No. 1074-A.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

EBNER GOLD MINING COMPANY et al.,
Defendant.

Opinion.

JENNINGS, Judge:

Defendants claim that some sort of superior equity or right by relation to June 20, 1910, enures

to them by reason of the rules of the old Harris Mining District and of the fact that on that date H. T. Tripp posted a notice claiming 10,000 inches of the water of Gold Creek.

There is no statute in Alaska *requiring* notices of the location of water rights to be posted or recorded, although there is a statute *allowing* them to be recorded, but that statute says nothing as to the effect of a notice when posted or recorded.

Defendants maintain, however, that the customs and rules of the old Harris Mining District are in evidence and that the Court should take them into consideration and allow defendant's water right to date from that notice. Conceding that the Court should take said customs and rules into consideration, and proceeding so to do, it appears that Articles 6, 7, 8, 9 and 10 of said rules provide as follows: [1467—1317]

'Art. 6. A person desiring to appropriate water must post a notice in writing, in a conspicuous place at the point of intended diversion, stating therein: First, he claims the water there flowing to the extent of (giving the number) inches, measured under a six-inch pressure; second, the purpose for which he claims it, and the place of intended use. A copy of the notice must within ten (10) days after it is posted be recorded in the books kept by the recorder of the district.

Art. 7. Within twenty days, during the working season, after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must

prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by rain or snow.

Art. 8. By completion is meant conducting the waters to the place of intended use.

Art. 9. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.

Art. 10. A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith.' "

It is apparent, by casual inspection of the Tripp notice that it fails to measure up to the requirements of Article VI—not only that, but the evidence shows that during the *ternty* days after the notice was posted the claimant (or his grantees) did not "commence the excavation or construction of the works in which he intends to divert the water" as provided in Article VII—Article VII therefore was not complied with. As *Article* 6 and 7 were not complied with, defendants gain no priority by relation by reason of the Harris Mining District rules, for it is "By a compliance [1468—1318] with the above rules the claimant's right to the use of the water relates back to the time the notice was posted."

Plaintiffs claim to have posted a notice on August 1, 1910—the Mulligan notice; even if they did, that notice is as defective as the Tripp notice—neither notice contains a statement of "the place of intended use."

On the 17th of August, 1910, defendants posted and recorded another notice. This notice I leave out of consideration, because prior to that time plaintiffs had actually commenced work.

On the 8th day of May, 1911, plaintiffs posted another notice—this notice I leave out of consideration, because prior to that date defendants were openly prosecuting work on their flume.

Thus, so far as relation back by virtue of Harris District Mining Rules is concerned, there is left out of consideration all the posted notices which have appeared in the evidence.

No case has been cited, and I apprehend that none can be found, where a water right in the absence of compliance with a statute or with local rules or customs, relates back to a written notice as a notice, pure and simple, securing to the poster of such notice rights which he would not have unless he had taken steps equivalent to a written notice. Notwithstanding that, it does not follow that if a notice be posted, even in those States where there is no statute or local custom or rule, the notice is of no effect whatsoever. Even in such cases the notice may have a very important effect, as evidence of the intention of the party posting it. This intention of the party is one of the vital elements that go to make up a valid appropriation of water. [1469—1319]

In the case of *McFarland vs. Perseverance Company* it is said by Judge Wickersham:

“To constitute a valid appropriation of water, three elements must always exist.

(1) An intent to apply it to some beneficial use

existing at the time or contemplated in the future.

(2) The diversion from the natural channel by means of ditch, canal or other structure.

(3) The application of it, within a reasonable time, to some useful industry.”

And he cites in support thereof

Nevada Ditch Co. vs. Bennett, 30 Ore. 59;

Lowe vs. Rizer, 25 Ore. 557.

And, in 3 Alaska, 572, Miocene Ditch Co. vs. Champion Mining Company, those three elements are again mentioned as being ——— essentials to constitute a valid appropriation of water.

I think that the statement of the essentiality of those three requirements may be considered as borne out by the authorities.

Now, the part that the notice would play under such circumstances, in jurisdictions where there is no statute nor local rules, is this: It would go to establish the first essential, to wit: intent—it would be evidence of the intent.

Miocene Ditch Co. vs. Mining Co., 3 Alaska, 582;

Weil, Section 380;

Weil, Section 376.

Not only does the notice have the effect of furnishing evidence of the intent of the persons posting the notice, but it also serves this purpose: It gives warning to others that somebody has got the intention of utilizing that water; in other words, it serves as a warning.

Weil, Section 374.

So that the part which the Tripp and Mulligan

notice play in establishing whether or not the parties have a water right is that they may be taken as evidence of intent.

So far as intent is concerned, I can attach no importance to the testimony that as long ago as ten years previous to August 1, 1910, the plaintiffs had determined that they would some day [1470—1320] build a mill on the shores of Gastineau Channel and would immediately need and use the waters of Gold Creek—and that that was the best way to work the ore bodies belonging to plaintiffs—plaintiff may have thought so—may have determined some day to carry out that plan. It is sufficient to say that if such was their plan and determination, for ten long years they kept all knowledge of it securely locked in their own breasts—neither stating it publicly, nor taking any outward visible steps to harness the waters of Gold Creek for the execution of their ultimate plan—they must have known during all those years that the waters of Gold Creek were liable to be appropriated by others to the full extent of the flow. Neither can I attach any importance to the testimony that prior to August 1st plaintiffs had secured a large number of claims over which they intended to lay out a flume line. It was not necessary that a person should actually own the land over which he wishes to lay a flume to convey water; and ground is taken up as a mining claim on the theory presumptively and primarily that, a discovery of gold having been made, it will justify the expenditure of time and money in further exploitation. So that I cannot see that the intent on the

part of plaintiffs was manifested at an earlier date than the date of the Mulligan notice—August 1, 1910. But defendants had manifested intent by the Tripp notice of June 20, 1910. Thus it appears that the defendants were prior in point of time in manifesting their intent. Defendants thus took the first step in notifying the world of the intent to appropriate—they took the first step to warn others to keep off. They were what is called the first comers.

But intent alone is not sufficient, it must be followed by diligence to appropriate and intent and appropriation are not sufficient—that must in turn be followed by beneficial use.

In view of the fact that there is no statute, and that neither side complied with any rules (at least until the rules had lost their efficacy, (if any they ever had) by reason of the fact that [1471—1321] before such compliance the adversary had actually begun work), how have not the defendants the prior right if they first manifested intent—first posted notice—first claimed—were first comers, and proceeded with diligence to appropriate and then with diligence to apply to a beneficial use? I think the manifesting of such intent is usually the first step to locate a mine or appropriate water, in a mining country.

The notice is a palpable and unequivocal outward sign of the intent to appropriate. In *Kimball vs. Gearhart*, 12 Cal., at page 49, the Court say:

“Thus is put in issue the very question of title, and this involves necessarily the due

prosecution of the work after the appropriation, or, in other words, after the indication by some palpable and unequivocal outward sign of the intent to appropriate. The title to the water does not arise, as we have intimated before, from the manifestation of a purpose to take, but from the effectual prosecution of that purpose. This prosecution, therefore, is a necessary element of a title.”

—and on page 316:

“The right to the water does not *yet exist*, and *it may never vest*. The most that is *in esse*, is, a right to acquire, by reasonable diligence, a future right to the water.”

This case does not seem to depend upon any statute or specially invoked rule. It is the law of appropriation. It is true that law was based on Miner’s Rules, but those rules and customs in that regard were and are so well known that they are what might be termed the Common Law of Waters. They were the outgrowth of usage and are the foundation of the law of mines and of waters on the public domain.

First adopted in California, that usage and custom has spread to all the Western States. It has spread to this Northern country.

That is the law of Alaska, irrespective of the rules of the Harris Mining District.

McFarland vs. Perseverance, 3 Alaska, 336.

If, after posting notice, work to appropriate be conducted with diligence and the application to a beneficial use be conducted [1472—1322] with

diligence, the ultimate actual appropriation will relate back to the notice—not because it is a piece of paper tacked to a stump—not because some statute or special rule so provides, but because it is the first step to appropriate and the actual appropriation will relate back to the first step.

Ophir Silver Mining Co. vs. Carpenter, 4 Nev. 936;

Kimball vs. Gearhart, 12 Cal. 27;

Canal Co. vs. Kidd, 37 Cal. 282;

McKinny vs. Smith, 21 Cal. 381;

Osgood vs. Eldorado Water Co., 56 Cal. 578;

Sieber vs. Frink, 2 Pa. R. 901.

It is true that the statutes in many States expressly provide that the first step is the posting and recording of a notice. Such statutes are but a crystallization of miners' rules. The fact recognizes that the posting of notice is a step. It was a step before any statute was enacted. If it preceded any other step, then it was the first step.

I find that the Tripp notice was the first step taken by any one.

A little after one month from taking this first step arrangements were made with surveyors and early in August the flume line was surveyed and work on the flume begun, and I am unable to find any lack of diligence in prosecuting the work of appropriating the water and of applying it to a beneficial use.

It seems to me, then, that the evidence on this application, does not show the right of plaintiff to be clear or probable. A fuller hearing may lead to the

opposite conclusion. If parties will get the case to issue I will try same at the earliest possible moment.

The application for an injunction *pendente lite* is denied. [1473—1323]

The plaintiff, to further maintain the issues on its part, recalled as a witness in rebuttal JOHN B. MARSHALL, who, having been previously duly sworn to tell the truth, the whole truth, and nothing but the truth, testified in answer to questions as follows:

**Testimony of John B. Marshall, for Plaintiff
(Recalled in Rebuttal).**

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Marshall, referring again to the exhibit that you prepared, I neglected to ask you whether you found any notices that were not dated at all?

A. Yes, sir.

Q. That didn't indicate where the water right was located? A. Yes, sir.

Q. How many notices did you find among all the notices examined by you that did not indicate the dates when the water right was located?

A. Fourteen.

Q. And as to those 14, you cannot tell what the period was between the date of location and the date of recording? A. No, sir.

Q. All the others were notices containing the date of location as shown in the exhibit? A. Yes.

Mr. HELLENTHAL.—That is all.

(Testimony of John B. Marshall.)

Cross-examination.

(By Judge WINN.)

Q. You left out quite a number of John Treadwell's location notices from that list, did you not, Mr. Marshall?

A. No; not in the Harris Mining District, I don't believe. [1474—1324]

Q. Are you sure of that?

A. As I gave this testimony before, I am not absolutely sure of it, but I don't think there are any left out.

Q. Salmon Creek is in this district and Douglas Island? A. Yes, sir.

Q. How long were you in going through this list, in checking it up to see whether you were correct or not? A. It took me about a week.

Q. Was that part of your official business?

A. No, sir.

Q. And you did it at the request of Mr. Hellen-thal? A. Yes, sir.

Judge WINN.—That's all.

(WITNESS EXCUSED.) [1475—1325]

The plaintiff, to further maintain the issues on its part, recalled as a witness in rebuttal F. W. BRADLEY, who, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

**Testimony of F. W. Bradley, for Plaintiff (Recalled
in Rebuttal).**

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You have already been sworn, Mr. Bradley?

A. Yes.

Q. Do you know where the Ebner mine is?

A. Yes.

Q. Do you know William M. Ebner? A. Yes.

Q. Do you know what property is connected with
the Ebner mine? A. Yes.

Q. Who was the owner of this mining property in
the year 1910 and for several years prior to that?

A. Ebner Gold Mining Company.

Q. Who was the president of that company?

A. Mr. Ebner.

Q. And who was the secretary?

A. Mr. Behrends.

Q. Did you, as President of the Alaska-Juneau
Gold Mining Company, have any negotiations with
the Ebner Gold Mining Company looking towards
the purchase of the Ebner mine by the Alaska-
Juneau Gold Mining Company?

A. Yes; through Mr. McDonald, General Superin-
tendent of the Treadwell and the Alaska-Juneau.

Q. In that connection—before I ask you anything
further, Mr. Bradley, do you know Joseph Mc-
Donald? A. I do. [1476—1326]

Q. Who did he represent for some years in this
country?

A. He was general superintendent of the Alaska-

(Testimony of F. W. Bradley.)

Treadwell and the Alaska-Juneau Gold Mining Company.

Q. I wish you would relate to the Court what negotiations were had between the Alaska-Juneau Gold Mining Company and the Ebner Gold Mining Company prior to 1910 in connection with the purchase of the Ebner mine by the Alaska-Juneau Company—just start from the beginning—what was first done?

Judge WINN.—I object to it as incompetent, irrelevant and immaterial; not rebuttal testimony, and too remote from the time of the inception of any rights in this case, to affect any of the issues as framed under the pleadings in this case.

The COURT.—Fix the time.

Q. When was that, Mr. Bradley?

A. That was in 1902.

The COURT.—Objection overruled.

Q. When the negotiations commenced?

A. Yes.

Q. Now, in a general way, state what was done in connection with those negotiations, without going into details of the negotiations themselves.

Judge WINN.—Did these negotiations terminate in any sort of a written contract, Mr. Bradley?

A. No.

Judge WINN.—With whom did you have the negotiations—I didn't understand you to say?

A. Originally through Mr. McDonald with Mr. Ebner and Mr. Behrends, and finally between Mr. Ebner and myself.

(Testimony of F. W. Bradley.)

Judge WINN.—Then your Honor, I ask that the witness be confined to whatever negotiations were had between him and Mr. Ebner and not what happened between Mr. McDonald and somebody else, because he says it is not in writing. [1477—1327]

The WITNESS.—That was in writing.

Judge WINN.—If it is in writing I demand that they produce the writing, if your Honor please.

The COURT.—Objection overruled.

A. The negotiations at this end were handled by Joseph McDonald with Mr. Ebner or Mr. Behrends and resulted in McDonald's sending me a written communication from the Ebner Gold Mining Company signed—

Judge WINN.—I object to any testimony, if your Honor please, as to what communication took place with Mr. McDonald.

The COURT.—Objection overruled.

A. This written communication was signed by the Ebner Gold Mining Company by Ebner, President, and Behrends, Secretary; this was followed up—

Q. Just before you go any further, Mr. Bradley—that communication was forwarded to you at San Francisco? A. Yes.

Q. I hand you here a paper which has been marked for identification Plaintiff's Exhibit No. 38, and ask you to look at it and see if you recognize that paper?

A. I have already looked through the paper, yes; to the best of my recollection it is a copy of the paper that was sent me at San Francisco.

Q. By Mr. McDonald? A. By Mr. McDonald.

(Testimony of F. W. Bradley.)

Q. What became of the original?

A. Destroyed in the fire of 1906.

Q. In San Francisco? A. At San Francisco.

Q. And this is a copy of that paper?

A. To the best of my recollection.

Mr. HELLENTHAL.—I now offer this in evidence—it is the paper marked for identification Plaintiff's Exhibit No. 38. [1478—1328]

Judge WINN.—We object to it, if your Honor please; this seems to be a typewritten copy, signed on the typewriter, and no signatures to it have been identified by Mr. Bradley; Mr. Bradley has not sworn it was a copy of any original paper, and they show Mr. Ebner's name on it as President of the Ebner Gold Mining Company, and an attestation by Mr. Behrends, Secretary; there is no foundation laid for the introduction of any such paper; it is something he says is a copy of something Mr. McDonald sent him; and besides that, your Honor, I am somewhat acquainted with the contents of it from what Mr. Ebner related the other day—it is a paper writing which Mr. Ebner has already testified that he had nothing in the world to do with, that he never signed any such paper; this is not an original; it is marked for identification and therefore is identified as that paper; it is incompetent, irrelevant and immaterial, and not supporting any of the issues in this case.

The COURT.—The defect is simply this, that Mr. Bradley hasn't yet sworn that the original was signed by Mr. Ebner or the Ebner Gold Mining Company; that he knows their signature and that

(Testimony of F. W. Bradley.)

the original was signed by them; if he can identify them that way, of course, the copy would be admissible if he knows the original cannot be produced.

Q. The original of this document, Mr. Bradley, to the best of your recollection, how was that signed, and by whom?

A. It was signed by Mr. Ebner as President, and by Mr. Behrends as Secretary, of the Ebner Gold Mining Company.

Q. Now, following the receipt of this document, did you see Mr. Ebner?

A. Yes; Mr. Ebner called on me in San Francisco, in the winter of 1902 and '3.

Q. In 1902 and '3? A. Yes. [1479—1329]

Q. Prior to Mr. Ebner's arrival, had you received this paper, the original paper, of which the paper now handed you is a copy? A. I did.

Q. What, if anything, did you do in going over the matters stated in the statement or report with Mr. Ebner?

A. I had it before me at my office, and my interview with Mr. Ebner was at the Occidental Hotel. Mr. Ebner had a great many maps and papers with him that he didn't want to take from his room, and I went down there and had my talk and meeting with Mr. Ebner; it didn't take place at my office where any papers I might have had were at that time.

Q. Was Mr. Ebner at your office prior to this meeting? A. He called on me there.

Q. And this paper was before you at that time?

A. Yes.